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Decisions January 80

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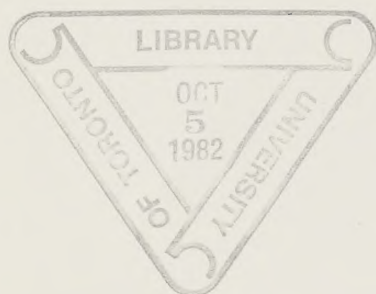
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ONTARIO LABOUR RELATIONS BOARD REPORTS

**A Monthly Series of Decisions from the
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Cited [1980] OLRB REP.

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also reported in *Canadian Labour Relations
Boards Reports, Butterworth & Co., Toronto.*



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0268-79-U Basil Cosgrove, Complainant, v. United Auto Workers, Local 1285, Respondent, v. **American Motors (Canada) Limited**, Intervener.

Duty of Fair Representation – Union adjusting complaints without filing grievances – No violation of section 60

BEFORE: E. Norris Davis, Vice-Chairman.

APPEARANCES: Basil Cosgrove for the complainant; Harold L. Hall and Douglas A. Schneider for the respondent; Derek L. Rogers and others for the intervener.

DECISION OF THE BOARD; January 23, 1980.

1. This is a complaint filed under section 79 of *The Labour Relations Act* in which the complainant alleges that the respondent has contravened section 60 of the Act. The allegations relate to three discrete instances in which it is alleged the respondent in representing the complainant did so in a manner violative of the Act. These instances relate to a complaint of an unsafe working condition, a complaint that a request by the complainant for a job description was unanswered, and a complaint that a request for removal of a medical work restriction was not acted upon.

2. The complainant, at all relevant times, was employed by American Motors Limited in a bargaining unit represented by the respondent. The complainant, Basil Cosgrove, was first employed by American Motors on September 6, 1971 and worked as an Assembler.

3. The first complaint in time arose in August, 1978 when the plant was breaking in a new line for the production of Jeeps and work assignments and times had been established on temporary basis subject to review. Mr. Harold Hall, Cosgrove's steward, testified that he had been called by Cosgrove who complained of not knowing what his job consisted of and requested a "job description". Hall identifies "job description" with "work assignment sheet" which latter lists the job as it has been set up by the Industrial Engineering Dept. together with the tools to be used, protective clothing etc. Hall states that at the time there was an estimated job assignment sheet for Cosgrove's job to which had been added additional work elements by the Industrial Engineering Dept. Hall contacted the Industrial Engineering Dept. which then performed a two day study of the job and "told employees how they were to work". Hall states that subsequently a permanent job assignment sheet was issued and that he had no further contacts with Cosgrove until Cosgrove received a warning notice for not performing his job. This warning notice was grieved in the established grievance procedure and settled at the step immediately preceding arbitration and Cosgrove was informed of its disposition. Hall states he had no further contact from Cosgrove in regard to this matter. While the complainant in cross-examination denied that there had been a two day study of the job by the Industrial Engineering Dept., we are satisfied that Hall's total account of the matter should be accepted. The complainant takes the position that he requested Hall to file a grievance to secure a job description and that action was not taken.

4. The second complaint occurred in early 1979 when Cosgrove suffered leg injuries by being struck by materials being moved on a dolly. This material movement was an integral part of the assembly line operation and, subsequent to Hall being brought into the matter by Cosgrove, a half-inch railing was installed on the floor which would prevent the dolly

from rolling into employees such as Cosgrove. The union also referred to this matter and another matter to the Industrial Health and Safety Branch of the Dept. of Labour. A copy of a letter from this Branch, dated February 20, 1979 was filed with the Board. This letter states, in part, "All of these matters were investigated by our inspector and there was no contravention of the Industrial Safety Act 1971". A copy of this letter was given to Cosgrove on April 26, 1979. The complainant does not dispute this testimony but takes the position that he had requested the filing of a grievance and no grievance was filed.

5. The third complaint involves the issuance by the Company Medical Director, Dr. A. S. Mallam, of a Medical Work Restriction to Mr. Cosgrove on January 29, 1979 and which was in the following terms:

"Too much bending and stooping on job – to be removed from present job (installing body side-step etc.) until job revised. No bending or stooping – preferably work at waist-level."

Dr. Mallam testified that he saw Cosgrove in the Company's Medical Centre on January 29th. The immediate reason for Cosgrove's presence was leg bruises resulting from being struck by moving material (as above referred to) but he also complained of stiff and sore legs from kneeling on the job. Dr. Mallam states, that in reviewing Cosgrove's record, he noted that on January 16th Cosgrove stated he had a job with "lots of bending" and that he felt his blood pressure was up, and Mallam was aware that Cosgrove had been under treatment for high blood pressure since January 1978. Mallam states that on January 29, 1979 Cosgrove's prime concern seemed to be that the bending and squatting required by the job was aggravating the blood pressure, and he therefore issued the work restriction. As a result of the work restriction Cosgrove was moved to another job and worked until January 31st for training purposes with the employee who he was displacing.

6. On January 31st Cosgrove again suffered a leg bruise which he did not report to anyone in the Company but reported to his family doctor who advised him to remain off the leg. He was then absent from work until April 23, 1979, the extended duration of which was attributed to other medical problems including surgery.

7. On reporting for work on April 23rd, Cosgrove reported to the Medical Centre, and the Nurse, noting that he had medical restrictions, referred him to Mr. K.J. Rowntree, Hourly Personnel Officer. According to Cosgrove, he was told by Rowntree that if he could not do the job to which he had been transferred to on January 29th he would have to go home. Accordingly, he was issued a "Cease work authorization" as being "medically laid-off" at 4:10 p.m., April 23, 1979. On April 24th, Rowntree talked to Cosgrove by phone and advised him that as there was no change in his restrictions he should return to the same job as he had in January following his re-assignment based on the medical restriction, and that job had been cleared by the Doctor, the Safety Inspector and the Nursing Supervisor. Rowntree asked Cosgrove to report for work that night, or as soon as possible, to which Cosgrove responded that he would not come in and would go to his own doctor. Rowntree confirmed this conversation by letter to Cosgrove dated April 24th in which he indicates "on talking with Mr. H. Hall, your Committeeman, he voiced no objection to you being placed on that job". Cosgrove testified that on April 23rd he had called on his steward but no details of this discussion were given.

8. At this point it becomes difficult to rationalize Cosgrove's position vis-a-vis his employment relationship and his medical condition inasmuch as on the one hand he is complaining of the existence of a Company Medical Restriction in the face of his own doctor's opinion that he was not disabled, and on the other hand, that he was totally disabled between April 23rd and July 3rd. Cosgrove states that "I shouldn't have restrictions when my own doctor said I was medically fit" and he asked the union to have the restrictions removed. Cosgrove testified that he talked with Hall on April 26th and "asked him to write out a grievance to remove medical restrictions, and as he wouldn't put in what I wanted as a violation of the contract I said may be my lawyer should write the grievance." Hall, who testified, corroborated this and filed with the Board a statement of grievance which he had prepared for Cosgrove, and which Cosgrove refused to sign because of his insistence that it include reference to the specific clause of the collective agreement alleged to be violated.

9. On the same day, April 26th, Cosgrove completed a claim form for Weekly Indemnity Payments supported by his doctor's statement completed the same date and certifying that as of April 23rd Cosgrove was totally disabled and, that at that point, predicting that Cosgrove would be able to return to work on May 3, 1979. As events developed Cosgrove did not return to work until July 3rd and testified that he had been certified as totally disabled by his own doctor for the entire period of the absence. He also testified that between April 26th and July 3rd he had no contacts with either the union or the company. This complaint was filed on May 9th, 1979.

10. We can only conclude that the complaint misconceives the function of the respondent as his bargaining agent: the complainant's position in these proceedings is based on the narrow ground that in respect to the first and second complaints the respondent failed to file a formal grievance as it was requested to do. But it is clear, on the evidence, that the respondent on being presented with Cosgrove's complaints in each case immediately instituted action with the employer resulting in a complete adjustment of the situation about which Cosgrove was complaining. In other words, the conditions of which Cosgrove was complaining as adversely affecting him in his employment relationship were, as a result of the respondent's actions, adjusted so that Cosgrove was no longer adversely affected. It escapes us how the representation of Cosgrove by the respondent could have been rendered any more efficacious by the physical filing of a formal grievance. At the risk of only stating the obvious it must be said that filing a formal grievance is by no means co-extensive with representation of a member of the bargaining unit but is merely one of the available mechanics available to the bargaining agent in securing a satisfactory settlement of issues. In any event, there is no evidence to support the allegation that the respondent in regard to the first and second complaints acted in a manner which was arbitrary, discriminatory, or in bad faith in its representation of the complainant.

11. In respect to the third complaint, the evidence establishes that no formal grievance was filed respecting work restrictions as a result of Cosgrove demanding that the grievance be so worded as to specifically identify one article of the collective agreement as having been violated, whereas Hall's judgment (in accordance with the union's general practice in such matters) was that the better course was to rely on the blanket allegation of violation of the collective agreement. The differences of opinion between Hall and Cosgrove as to the most effective manner of proceeding resulted in Cosgrove not signing the prepared grievance and thereby precluding its processing. There was not a refusal by the union to process the grievance and secure an adjustment of the complaint but rather a refusal to accept Cos-

grove's judgment in place of the union's judgment as to what approach in the grievance wording would be most productive of the desired result. This is the type of judgment which representatives of a bargaining unit are required to make, subject to the statutory limitations imposed by section 60 of the Act. We find no evidence of bad faith, discrimination or arbitrariness tainting the exercise of that judgment in this matter.

12. The complaint is dismissed.

0769-79-R Printing Specialties & Paper Products Union Local 701, London, Ontario, Applicant, v. **Atlantic Packaging Products Ltd.**, Respondent, v. Canadian Paperworkers Union, Intervener.

Certification – Parties – Reconsideration – Intervener seeking reconsideration of certification granted to applicant – Intervener not party to original application – Board granting intervener status to request reconsideration

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members O. Hodges and F.W. Murray.

APPEARANCES: *C.M. Mitchell and J. Eliot for the applicant; S.C. Bernardo and John Cherry for the respondent; Douglas J. Wray and G. Bucella for the intervener; D. Ublansky for the Canadian Chemical Workers.*

DECISION OF THE BOARD; January 8, 1980.

1. In a decision dated August 24, 1979 the Board certified the applicant trade union as bargaining agent for all employees of the respondent located at Ingersoll, Ontario save and except foremen, persons above the rank of foreman, office staff and sales staff. The employer, although served with proper notice, did not appear at the certification hearing. The documents filed by the respondent with its reply showed two employees working within the bargaining unit as of July 25, 1979; the date of application. The union submitted membership evidence on behalf of both employees falling within the unit and accordingly, the Board certified the applicant without a vote by the above referred to decision of August 24, 1979.

2. On October 10, 1979 the Canadian Paperworkers Union filed an application for certification in respect of essentially the same group of employees for which the Printing Specialties and Paper Products Union, Local 701 (the applicant in this matter) had been certified on August 24, 1979. The Printing Specialties and Paper Products Union intervened in that application and argued at the hearing that the certificate issued to it on August 24th served to bar the Canadian Paperworkers Union's application. The Canadian Paperworkers Union argued in reply that the August 24th certificate was issued at a time when there was not a representative number of employees in the bargaining unit; that is during a period of build-up. The Canadian Paperworkers Union, therefore, sought to have the Board:

“Reconsider its earlier decision issuing a certificate to the Printing Specialties and Paper Products Union, Local 701, pursuant to Section 95(1) of *The Labour Relations Act*, and either revoke the earlier Certificate, or in the alternative, order a representation vote.”

The panel of the Board seized with the application for certification filed by the Canadian Paperworkers Union (a different panel than that which certified the Printing Specialties Union in August) dealt with the Canadian Paperworkers Union's request for reconsideration of the Board's decision certifying the Printing Specialties Union in a decision dated November 9, 1979 as follows:

“Since the certificate issued by the Board to the intervener on August 24th, 1979 poses a bar to this application and, since the applicant's request that the Board's decision be reconsidered is a matter which should be determined by the panel that issued the decision, the Board decided to adjourn these proceedings in respect of all matters therein so that the applicant's request for reconsideration could be determined by the other panel. This panel of the Board makes no recommendation as to the consolidation of any of the matters referred to in the representations of the parties.”

3. The panel of the Board which certified the Printing Specialties Union on August 24, 1979 convened a hearing on December 11, 1979 for the purpose of entertaining the request of the Canadian Paperworkers Union that the Board reconsider its earlier decision pursuant to Section 95(1) of the Act. The Canadian Chemical Workers Union also appeared at the December 11th hearing for the purpose of intervening in the proceedings. Counsel for the Canadian Chemical Workers Union advised that he sought to intervene for the purpose of dealing with the “build-up”. The Printing Specialties Union and the respondent company challenged the status of both the Canadian Paperworkers Union and the Canadian Chemical Workers Union to intervene following the issuance of a certificate for the purpose of asking the Board to reconsider the granting of the certificate.

4. The Canadian Paperworkers Union submitted membership cards signed by 9 of the 15 employees in the bargaining unit in support of its application for certification and asks to be given status to intervene in these proceedings on the basis that it represents a majority of the employees affected by the Board's earlier decision to certify the Printing Specialties Union. The Canadian Chemical Workers Union submitted membership cards signed by three employees in the bargaining unit and on the basis of these asked for status to intervene.

5. The parties asked the Board to rule upon the status of the Canadian Paperworkers Union and the Canadian Chemical Workers Union to intervene in these proceedings before considering the merits of the request for reconsideration.

6. Counsel for the applicant trade union relies on *Formrite Forming Ltd.* [1971] OLRB Rep. Feb. 49, *Delcon Electric Limited*, [1976] OLRB Rep. July 362 and *Durable Drywall* [1973] OLRB Rep. March 145 in support of his argument that regardless of the membership cards submitted by the trade unions seeking to intervene the proceedings had been completed and cannot now be reopened. Counsel for the applicant trade union argues

that it would not make good industrial relations sense to reopen the proceedings and thereby destabilize the situation and undermine his client's reliance upon the earlier certificate. Although counsel for the applicant also touched on the merits of the request for reconsideration, the Board has not been asked to deal with the merits at this stage and in our view the grounds upon which a party seeks to intervene cannot affect that party's status to intervene. (See *Neo Industries Limited* [1976] OLRB Rep. April 88.) Counsel for the respondent employer supported the arguments advanced by counsel for the applicant union and asked the Board to deny status to both of the unions which seek to intervene.

7. Counsel for the Canadian Paperworkers Union argues that the Canadian Paperworkers Union has established that it represents a majority of the employees affected by the Board's earlier decision; employees who have been deprived of an opportunity to select a bargaining agent of their choice because of the issuance of the certificate to the Printing Specialties Union. Counsel for the Canadian Paperworkers Union maintains that under section 95(1) the Board is empowered to reconsider a prior decision at any time and in the circumstances of this case should not refuse to grant status because of the passage of a few months when there has been no detrimental reliance upon the Board's certificate by the applicant trade union as evidenced by a collective agreement. Counsel for the Canadian Paperworkers Union relies on the *Neo Industries* case, *supra* and *Neo Industries* [1976] OLRB Rep. April 137 in support of his position that a trade union which represents at least one employee in the bargaining unit is entitled to intervene and be heard. Finally, counsel for the Canadian Paperworkers Union relies on *Genaire Ltd. and International Association of Machinists*, 14 D.L.R. (2d) 201, Ontario High Court as upheld by the Court of Appeal, 18 D.L.R. (2d) 588 as support for the proposition that it has status to seek reconsideration of the Board's earlier decision to certify the Printing Specialties Union. Counsel for the Canadian Chemical Workers Union adopted the arguments advanced by counsel for the Paperworkers Union.

8. In the *Formrite Forming Ltd.* case, *supra*, a trade union sought to have a Board decision to certify another trade union reconsidered on the grounds of alleged employer support and alleged deficiencies in the Form 54 filed in support of the earlier application. The request was made some 8 months following the issuance of the certificate. The trade union which sought to intervene filed a membership card signed by a person who was in the employ of the respondent as of the date of the request for reconsideration but who had not been so employed as of the date of the filing of the original application nor at the time of the granting of the certificate. The Board refused to entertain the request for reconsideration in the *Formrite* case on the grounds that:

"In our opinion, the proceeding in which the applicant applied for certification was completed upon the granting of the certificate to the applicant on May 27, 1970. There is therefore no proceeding in circumstances to which the Council may be added as a party. The Council was at all times and remains a stranger to the said proceeding."

In *Delcon Electric Limited*, *supra*, the Board cited the *Formrite* case, *supra*, with approval in refusing to entertain a request for reconsideration made under similar circumstances to those prevailing in the *Formrite* case.

9. In so far as these decisions may be read as standing for the proposition that once a

certificate is issued the proceedings are at a close and cannot be reconsidered we are in disagreement. The Board is given a broad discretion under section 95(1) of the Act to reconsider any decision at any time. The courts dealt with the scope of the Board's authority in this regard in *Genaire, supra*, and commented as follows:

“In my view, unless the legislature had somewhere limited the powers of anyone affected by a decision of the Board to make application to have its decision revoked the Board is bound to hear the application to determine whether the decision ought to be revoked or not. . . .

I think that the broad powers given under s. 68 [now s. 95] are intended to cover situations that are not specifically dealt with where in the opinion of the Board the parties should have relief.”

We are of the view that so long as a party seeking to intervene, either in the first instance or for the purpose of reconsideration, demonstrates the necessary degree of interest the Board should grant status and decide the matter on the merits. This is not to say, and indeed the contrary is true, that the Board should not be strongly influenced by the practical need for finality in reconsidering any of its decisions.

10. The degree of interest necessary to attain party status in a certification matter has been reviewed in the recent *ESB Canada Limited* case, Board File 0701-79-R, December 14, 1979 wherein at para. 9 the Board stated.

“The Board has consistently denied a union standing to intervene in certification proceedings or the reconsideration thereof in the absence of demonstrating that it is the bargaining agent for the employees in the bargaining unit or that it represents one or more persons in the bargaining unit in question. In *Napev Construction Limited*, [1976] OLRB Rep. March 109, the Board at 111 summarized its approach to a union's standing to intervene in certification proceedings:

‘Where attempts have been made to intervene in certification proceedings, the Board has consistently held that, in order to safeguard the rights of parties originating proceedings, and with a view to eliminating delay by parties claiming an interest a would-be intervener must meet certain requirements. These requirements are deemed necessary in the field of industrial relations where time is indeed of the essence in order to avoid delay, multiplicity of proceedings and frustration of the purposes of the Act by parties who have no real representative status with respect to the employer and the employees involved. The Board has always required that an Intervener must be either an employee in the bargaining unit to which the proceedings relate or a union holding representational authorization from one or more persons in the bargaining unit. In the absence of these requirements, intervention has been denied.’”

(See also *Neo Industries Limited* [1976] OLRB Rep. April 88)

11. In this case both of the trade unions which seek to intervene for purposes of seeking reconsideration of the Board's August 24th decision to certify have met the necessary requirements for party status. Both unions represent at least one employee in the bargaining unit who has been directly affected by the Board's earlier decision to certify the Printing Specialties Union. In the result we are prepared to accord intervener status to both the Canadian Paperworkers Union and the Canadian Chemical Workers Union and to entertain their submissions in respect of whether or not we should reconsider our decision of August 24, 1979 to certify the Printing Specialties union.

12. It should be noted that even if this panel had not accorded intervener status to the Canadian Paperworkers Union for purposes of seeking reconsideration of the Board's August 24th decision the effect of that decision, in so far as it is alleged to constitute a bar to the application for certification filed by the Canadian Paperworkers Union, would nevertheless have had to have been dealt with by the panel seized with that matter. (See *Neo Industries* [1976] OLRB Rep. April 137). The long-standing practice of this Board is however, to allow the panel making the original decision to remain seized for purposes of reconsideration.

13. This matter is hereby referred to the Registrar and is to be put on for a hearing on the merits of the request for reconsideration.

**1149-78-M Ontario Public Service Employees Union, Applicant, v.
Cambrian College of Applied Arts & Technology, Respondent.**

Employee – Reference – Determination by Board under Section 82 of The Colleges Collective Bargaining Act, 1975 – Procedure for determining employee status reviewed

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Wm. A. Lokay and D. W. LaBelle for the applicant; Janice Baker and others for the respondent.*

DECISION OF THE BOARD; January 28, 1980.

1. The applicant is seeking a determination from the Board under section 82 of *The Colleges Collective Bargaining Act, 1975* in respect of 15 persons employed by the respondent in nine different job classifications. The purpose of the reference is to have the Board determine whether these persons are employees within the meaning of the Act and, if they are, in which of two bargaining units established by the statute they belong.

2. A Labour Relations Officer was appointed to inquire into the duties and responsibilities of these persons. The parties agreed in their meetings with the Officer that M. Horne, D. Pernu, B. Ledger and M. Kaminski be deleted from the reference and that the Board make no determination in respect of F. Musico and C. Brouillard. They also agreed that N. Chouinard is an employee within the meaning of the Act and that the Board should determine in which bargaining unit the employee belongs. At the hearing before the Board

held for the purpose of receiving the parties' submissions on the conclusion which they wished the Board to reach on the report, they agreed that J. Steciuk was not an employee under the Act. The names and job classifications are listed below of the seven remaining persons whose status under the Act is to be determined by the Board.

M. Clement	– Student Activities Co-ordinator
C. Vandendriesche	– Programmer-Analyst
G. Dumas	– Community Program Co-ordinator
A. Favot	– Community Program Co-ordinator
H. Schmidt	– Manager Evening Programs
D. van Leeuwen	– Manager Client Services
C. Sanford	– Media Specialist

2. The Student Activities Co-ordinator, M. Clement, reports to the Dean of Student and Academic Services Division and is responsible for operation of the student residence at the respondent's Regent Street campus and for developing and administering comprehensive student activities programs (extra-curricular). He has reporting to him a stenotypist and the residence co-ordinator, both of whom are employees under the Act, and the residence don and 10 students who are part-time employees of the college. The don and the 10 students are not employees for the purposes of the Act. In respect to the two employees, Clement's authority includes hiring and effective recommendation for firing; scheduling and assigning of work; evaluating work performance which affects eligibility for probationary pay increase; approving time sheets for pay purposes and handling employment-related problems. While he has disciplinary authority, the evidence is unclear whether it extends to these two employees. The evidence demonstrates that he has a similar responsibility for supervising the don and the 10 students who are part-time employees, except that he has authority to discipline them and report his action to the dean. He is also involved with the discipline of students generally. Clement spends 50 to 60 per cent of his time supervising these 13 persons. His responsibility in the area of financial control includes the formulating of the recommended budget for his department and administering the approved annual budget (\$84,000); administering annual residence budget (\$175,000) and controlling the expenditure of funds under a \$50,000 Student Administrative Council budget and an \$8,000 Residence Council Budget. He gives final approval for the release of funds up to \$800.00 from the Student Administrative Council budget. He approves expenditures within his department budget and the residence operations budget but those are subject to the college's requisitioning procedures. He approves the purchase of supplies for the residence without other prior approval, however. He also contracts for the printing of the student handbook without specific prior approval. He meets on a regular and continuing basis with the faculty deans and chairmen on college policy matters.

4. Cora Vandendriesche, Programmer-Analyst, develops computer systems and programs for the use of students, faculty, administration staff and outsiders. She is one of two persons in this classification who are responsible to the manager of computer services for the systems design and programming function. She does not have any direct supervisory responsibilities over other employees in the department but has the authority to issue instructions to them in respect of the execution of jobs on the computer. She also provides technical advice and supervision for all users of computer systems. Vandendriesche has access to all information necessary for designing the systems which supply the users with their information needs, including access to information in the computer data files on existing sys-

tems and programs. There is no evidence that she has had access to information which is confidential in respect of employee relations, but would have such access if the need arose in designing new systems or in maintaining of existing ones.

5. Both Community Program Co-ordinators, Gil Dumas and Aldo Favot, are responsible to the chairman of community programs for the delivery of continuing education courses within the geographical jurisdiction served by the college. They assess the need for courses and then develop courses to satisfy those needs. Their responsibilities include the selection of teaching facilities and course instructors, the marketing and general administration of the courses. They recruit and supervise from four to eight community liaison officers and 60 to 80 part-time instructors. Both recommend candidates for hire as community liaison officers for final approval (usually granted) by the chairman. They have hiring, firing and disciplining authority over part-time instructors. They evaluate the performance of part-time staff and handle their employment related problems. One of the Co-ordinators supervises two full-time adult education instructors. The Co-ordinators contract for space in the community for training courses and negotiate contracts for specialized part-time instruction services with individuals, firms and agencies.

6. The Manager of Evening Programs, Helge Schmidt, has dual reporting relationships. She is a Community program Co-ordinator with duties, responsibilities and authority similar to Dumas and Favot and in this role she reports to the Chairman of Community Programs. But she is also responsible to the Dean of Continuing Education for the operation of evening classes at one of the two Sudbury campuses of the college. In this role she deals with and resolves problems in respect of course scheduling, instructor absence, classroom allocation and the supply of services to students and instructors. She deals also with similar problems by telephone contact with satellite campuses outside of Sudbury.

7. Dave van Leeuwen, Manager Client Services, is responsible to the dean of the continuing education division for marketing the full range of the college's services throughout the geographical jurisdiction of the college. Operating through the community programs department of the continuing education division, he develops and administers courses within the Training in Business and Industry, Management Development and Professional Association programs. In this respect his duties, responsibilities and authority are essentially the same as the community program co-ordinator, including the hiring, firing, evaluating and disciplining of 25 to 30 part-time instructors. He has the added responsibility of administering all media advertising and contract printing for the continuing education division, which involves controlling annual expenditures of \$30,000.00 for advertising and \$40,000.00 for contract printing. He signs on his own authority contracts for advertising and printing committing the college to expenditures within the aforesaid annual amounts. He also provides the liaison between the division and the computer centre and instructional media centre of the college. The Manager Client Services has the prime responsibility for the marketing of all of the colleges continuing education programs. He plans, develops and implements the marketing strategies for these programs and assures that the Community Program Co-ordinators, including Schmidt are instructed in and equipped to execute these strategies. He serves on the Dean's divisional committee together with two chairmen, a department head and the division's manager of officer services. The committee assists the dean with the resolution of policy problems at the division level, co-ordinates and schedules all of the academic resources of the college used in the continuing education program.

8. The Media Specialist, Clark Sanford, is responsible to the Dean of Student and Academic Services for developing, designing and producing instructional materials and programs for classroom use; counselling and advising all levels of faculty in the teaching use of media available through the college's instructional media centre. He also produces promotional material for use by the college in marketing its programs in the community. Sanford has no persons under his direct supervision, but exercises technical supervision over technical specialists in the media centre who are engaged in the production of instructional and promotional material. As a result of this technical supervision he participates in evaluating the technical performance of media centre employees and also in the screening of candidates for technical positions in the centre.

9. The scope of the Board's authority to determine the status under the Act of the persons in question is contained in section 82 of the Act which states as follows:

"If, in the course of bargaining for an agreement or during the period of operation of an agreement, a question arises as to whether a person is an employee, including a question as to whether a person employed as a chairman, department head, director, foreman or supervisor is employed in a managerial or confidential capacity pursuant to clause 1 of section 1 and the schedules, the question may be referred to the Ontario Labour Relations Board and its decision thereon is final and binding for all purposes."

10. A unique feature of the statute is that it establishes two bargaining units for the purposes of collective bargaining in respect of employees of Colleges of Applied Arts and Technology (community colleges) in the province. These units are defined in schedules 1 and 2 of the Act and section 1(f) defines an employee as a person employed in a position or classification that is within either of the two units. The relevant portions of the Act are as follows:

Section 1(f)

"1. In this Act and the Schedules,

- (f) 'employee' means a person employed by a board of governors of a college of applied arts and technology in a position or classification that is within the academic staff bargaining unit or the support staff bargaining unit set out in Schedules 1 and 2."

Schedule 1

"The academic staff bargaining unit includes the employees of all boards of governors of colleges of applied arts and technology who are employed as teachers, counsellors or librarians but does not include,

- (i) chairmen,
- (ii) department heads,
- (iii) directors,

- (iv) persons above the rank of chairman, department head or director,
- (v) other persons employed in a managerial or confidential capacity,
- (vi) teachers who teach for six hours or less per week,
- (vii) counsellors and librarians employed on a part-time basis,
- (viii) teachers, counsellors or librarians who are appointed for one of more sessions and who are employed for not more than twelve months in any twenty-four month period,
- (ix) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practise in Ontario and employed in a professional capacity, or
- (x) a person engaged and employed outside Ontario.”

Schedule 2

“The support staff bargaining unit includes the employees of all boards and governors of colleges of applied arts and technology employed in positions or classifications in the office, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff, but does not include,

- (i) foremen,
- (ii) supervisors,
- (iii) persons above the rank of foreman or supervisor,
- (iv) persons employed in a confidential capacity in matters related to employee relations or the formulation of a budget of a college of applied arts and technology or of a constituent campus of a college of applied arts and technology including persons employed in clerical, stenographic or secretarial positions,
- (v) other persons employed in a managerial or confidential capacity,
- (vi) persons regularly employed for not more than twenty-four hours a week,
- (vii) students employed in a co-operative training program undertaken with a school, college or university,
- (viii) a graduate of a college of applied arts and technology during the period of twelve months immediately following completion of a course of study or instruction at the college by the graduate if the employment of the graduate is associated with a certification, registration or other licensing requirement,

- (ix) a person engaged for a project of a non-recurring kind,
- (x) a person who is a member of the architectural, dental, engineering, legal or medical profession, entitled to practice in Ontario and employed in a professional capacity, or
- (xi) a person engaged and employed outside Ontario.”

Item (v) of the exclusions from both schedules is further defined by section 1(l) of the Act as follows:

“1. In this Act and in the Schedules,

- (l) ‘person employed in a managerial or confidential capacity’ means a person who,
 - (i) is involved in the formulation of organization objectives and policy in relation to the development and administration of programs of the employer or in the formulation of budgets of the employer,
 - (ii) spends a significant portion of his time in the supervision of employees,
 - (iii) is required by reason of his duties or responsibilities to deal formally on behalf of the employer with a grievance of an employee,
 - (iv) is employed in a position confidential to any person described in subclause i, ii or iii,
 - (v) is employed in a confidential capacity in matters relating to employee relations,
 - (vi) is not otherwise described in subclauses i to v but who, in the opinion of the Ontario Labour Relations Board should not be included in a bargaining unit by reason of his duties and responsibilities to the employer.”

11. This particular construction of the Act has several results. It removes from the Board as the administering tribunal the task of defining what is an appropriate bargaining unit and, in leaving with the Board the task of determining whether persons are included in or excluded from either unit, focuses the Board’s attention by setting out, in more detail than is customary in provincial collective bargaining legislation, the criteria for making that determination. There are five categories of exclusions:

- (a) persons engaged and employed outside Ontario;
- (b) persons in a part-time, short-term or specified-term employment relationship;
- (c) persons who are members of self-regulated professions and employed in one of those professions;

- (d) persons employed in a managerial capacity; and
- (e) persons employed in a confidential capacity in matters related to labour relations.

In other collective bargaining legislation, it would usually be left to the administering tribunal to determine whether the first two categories formed an appropriate unit, or part of a unit as part of the task of defining a unit that is appropriate for collective bargaining. The third category is a commonly legislated exclusion and is similar to section 1(3)(a) of *The Labour Relations Act*. The fourth and the fifth categories are also commonly legislated exclusions, as, for example, in section 1(3)(b) of *The Labour Relations Act*. What distinguishes these two categories (i.e., d & e) of exclusions in this Act from other statutes is the itemized criteria which the Act sets out for them. In the case at hand, it is only these last two categories, i.e., the managerial and confidential exclusions with which we are concerned.

12. The Act defines the managerial and confidential exclusions in items (i) through (v) of both Schedules and in section 1(l). This itemizing of the criteria does not alter, however, the purpose of the exclusions, which is to assure an arms length relationship between the parties to the collective bargaining process; i.e., the employees and the employer. Because of the importance of an arm's length relationship to an effective collective bargaining relationship, the Board has found frequent need to comment on it in the course of making a determination under section 1(3)(b) of *The Labour Relations Act*. Its observations in *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396 contain an excellent statement of the need to identify and separate the parties to collective bargaining and are equally applicable under the Act in this matter.

“12. The identification of management is fundamental to the scheme of collective bargaining as set out in *The Labour Relations Act*. What is contemplated is an arm's length relationship between the employees represented by a bargaining agent, on the one side, and the employer acting through management on the other side. The Act attempts to create a balance of a power between these two sides by insulating one from the other. Employees, therefore, are protected from management interference and domination by the prohibitions against employer interference with trade union and employee rights. Management, by the same token, is protected by excluding from collective bargaining either persons exercising managerial functions, or persons employed in a confidential capacity in matters relating to labour relations. Collective bargaining rights, therefore, are not universal, but must be qualified by the need to preserve a countervailing force on the employer side.”

Section 1(l) of the Act sets out the itemized criteria by which the Board is to determine whether a person is employed in a managerial or confidential capacity. While this itemizing seems to proscribe, in a section 82 referral, the Board's use of the broad range of criteria which it applies when it is called upon to determine the same question under section 1(3)(b) of *The Labour Relations Act*, the Board has noted that these criteria are applicable to at least two of the criteria under this Act. First, for determining if a person is employed in a confidential capacity in matters related to employee relations [(item (iv) of Schedule 2 and sub-section 1(l)(v)]. In this respect see *Humber College of Applied Arts and Technology*, Board

File No. 1978-76-M (unreported). Second, for deciding whether to exercise the Board's discretion under sub-section 1(l)(vi) to exclude a person from either bargaining unit "... by reason of his duties and responsibilities to the employer" even when he is not excluded by sub-section 1(l)(i) through sub-section 1(l)(v). See *The Board of Governors of Algonquin College, et al*, [1977] OLRB Rep. May 257 at paragraph 11.

13. The construction of the exclusionary provisions of the Act has caused the Board to adopt a two-step approach for determining a person's employment status under the Act. Briefly stated, the approach involves:

- (a) determining in which bargaining unit they would be placed if they were found to be employees, and
- (b) whether they are among the categories of persons expressly excluded from the relevant schedule.

The first step involves examining the nature of their work and deciding whether it may be characterized as that of teacher, counsellor, librarian or office, technical, health care, maintenance, building service, shipping, transportation, cafeteria and nursery staff. The answer at the first step determines which set of exclusions the Board is to apply at the second step. If the second step requires a determination as to whether they are "other persons employed in a managerial or confidential capacity", it becomes necessary to resort to section 1(l) of the Act. The results of applying this procedure to the evidence in this case are set out hereunder.

M. Clement – Student Activities Co-ordinator

14. The evidence in the Labour Relations Officer's report reveals that the primary thrust of the Student Activities Co-ordinator position is to enhance the total learning experience of students attending the college. All of Clement's job activities are related to that objective and, as a result, he spends most of his time advising, counselling and supervising students in respect of their student government, social and recreational activities, including the students' role in the operation of the residence. While the focus of Clement's advisor and counsellor role with students is not on their academic curricula, it involves a direct, functional contact with students fully compatible with the context of the academic staffing bargaining unit. Consequently, we find that the student activities co-ordinator may be characterized as a "counsellor" placing him in Schedule 1.

15. Looking next to whether Clement should be included in or excluded from Schedule 1, there is no claim that he is excluded by items (i) through (iv). Thus the issue becomes one of whether he is employed in a managerial or confidential capacity and thus excluded under item (v), which in turn directs us to sub-section 1(l). Is Clement, on the evidence, captured by any of the specific exclusion of sub-section 1(l)(i) through 1(l)(v)? While his responsibility for developing programs for students activities and for the operation of the student residence might be taken as involving Clement in the development and administration of programs of the employer, it is not involvement in the formulation of objectives and policy. Therefore he is not excluded by the first part of sub-section 1(l)(i). Insofar as the second part is concerned, Clement prepares and submits for approval his departmental budget, administers the approved budget, supervises the preparation and administration of the bud-

gets for the student residence and the Student Administrative Council. While this activity may constitute involvement with “formulation of budgets of the employer”, it must be viewed keeping in mind the purpose of the managerial and confidential exclusions. It is reasonable to conclude that the Legislature intended persons to be excluded who were privy to and materially involved with confidential budget data relating to employee relations, the disclosure of which would be adverse to the employer’s interests. There is insufficient evidence about Clement’s involvement with the aforementioned budgets to conclude that a useful collective bargaining purpose would be served by excluding him. The Board finds, therefore, that he is not excluded by the second part of sub-section 1(l)(i).

16. The facts are that Clement spends from 50 to 60 per cent of his time supervising the 13 persons who report to him, of which only the steno-typist and the residence-co-ordinator are employees of the college. Sub-section 1(l)(ii) excludes a person who “spends a significant portion of his time in the supervision of employees”. The use throughout the Act of the words “employee” and “person” leads us to conclude that, when the word “employee” is used, it must mean as defined by the Act and not employees of the College in the ordinary sense of the word. This means that Clement supervises two employees and, while there is no evidence as to how much of his time is spent supervising them, it may be reasonably inferred from the full content of his job that he does not spend a significant portion of his time in the supervision of these two employees. Therefore he is not excluded by sub-section 1(l)(ii).

17. There is some evidence that the two employees come to Clement with problems, but there is no evidence which would support his exclusion by sub-section 1(l)(iii) by reason of his having to deal formally on behalf of the employer with a grievance of an employee. He is not employed in a position which would be captured by the exclusion defined in sub-section 1(l)(iv), nor does the evidence reveal him to be employed in a confidential capacity in matters relating to labour relations (sub-section 1(l)(v)). He has access to information treated by the college as confidential, but not of a nature such that its improper use would prejudice the employer’s position in the collective bargaining relationship.

18. For the above reasons, we find that Clement is not captured by any of the itemized exclusions of Schedule 1 or sub-section 1(l). Should the Board exercise its discretion under sub-section 1(l)(vi), then, to exclude him “... by reason of his duties and responsibilities to the employer.”? The sub-section gives the Board the clear, discretionary authority to exclude from collective bargaining persons who are not captured by the specific exclusions of the schedules and sub-section 1(l). Bearing in mind that our objective is to identify persons employed in a managerial or confidential capacity for the purpose and reasons stated in paragraph 12, it makes sense in our judgment to exercise that discretion so as to exclude persons who would be excluded by the Board’s tests for managerial and confidential function under section 1(3)(b) of *The Labour Relations Act* who are not captured by the detailed exclusions of the schedules and sub-section 1(l) of the Act. As we have already commented in paragraph 12, the confidentiality criteria of Schedule 2, item (iv) and sub-section 1(l)(v) are open to application of the Board’s section 1(3)(b) tests for confidentiality, so it is more likely that the Board will be concerned primarily with the managerial exclusion whenever it is considering the exercise of its discretionary function such as, for example, the “supervision and control” test or the “effective recommendation” test, are essentially tests which assist it to determine whether a person’s duties and responsibilities identify him as a member of the employer’s management team and thus a participant in the decision-making functions of management. (See for example *Rio Algoma Mines Limited*, [1970] OLRB Rep. Nov. 865 at

paragraph 11). Therefore, when the application of the Board's test reveal a person to be part of the management team, in our view that would be an appropriate situation in which to exercise the Board's discretion under sub-section 1(l)(iv) to exclude the person from the bargaining unit. This does not mean that a bald assertion that a person is "on the management team" will result in the Board automatically exercising its discretion. Rather the Board will apply its test to the facts of each situation as required, using the tests as guidelines for determining if the exercise of management function is present in the situation under review. These tests and their application are extensively canvassed in *McIntyre Porcupine Mines Limited*, [1975] OLRB Rep. Apr. 261 and, more recently, in *Spar Aerospace Products Ltd.*, [1979] OLRB Rep. July 700, which is an excellent example of why the Board must be prepared to consider each situation separately on its own facts. Or, more generally, see Sack and Levinson, *Ontario Labour Relations Board Practice* (Butterworth & Co. (Canada) Ltd., 1973) at pp. 28-34 and the cases listed therein. See also the 1977 Supplement to the text at pp. 11-14 for a review of the more recent decision of the Board in dealing with a variety of forms of managerial function.

19. We find support for this view that the Board should exercise its discretion as set out above in an unreported decision of the Ontario Public Service Labour Relations Tribunal ("The Tribunal") under *The Crown Employees Collective Bargaining Act, 1972* ("the Statute") in re *The Crown in Right of Ontario and Ontario Public Service Employees Union* (re Ian Welton), File T3/76. The structure of the statute, insofar as its exclusionary provisions are concerned is similar to the Act and the wording of section 1(1)(m)(ii) of the Statute is identical to that of sub-section 1(1)(i) of the Act. The Tribunal commented, in part, as follows on the place of section 1(l)(m)(ii) within the context of the overall managerial and confidential exclusions of the Statute:

"... there is a range of persons who may neither supervise employees nor have much if anything to do with employees directly and who are not considered to be heads of a particular government operation, but are excluded from being employees under the Act because they are considered part of the managerial team.";

and the Tribunal concludes as follows:

"..., generally and in context, section 1(1)(m)(ii) is concerned with members of the managerial team, who are usually but perhaps not always senior government personnel who, while they may not spend a significant portion of their time in supervising other employees nevertheless do not share a community of interest with members of the bargaining unit for the purposes for which the unit exists".

20. Let us see what is the result of applying to Clement the Board's tests for managerial function. His authority to hire, schedule and assign work, approve timesheets for pay purposes and evaluate the work performance of the two employees, the residence don and the 10 students who are part-time employees, his authority to discipline the 11 part-time employees and report the action taken to the dean indicates that Clement exercises a reasonable degree of supervision and control and effective recommendation in respect of persons over whom the respondent has an ultimate managerial responsibility. He exercises independent decision-making discretion in respect of the development and administration of

student activities programs and operation of the student residence. He also commits the respondent to significant expenditures of funds and exercises a stewardship over expenditure of student government funds. None of these individual aspects of the position is sufficient by itself to identify Clement as a member of the management team, but the sum of them, in our view, places him surely on that team and, as such, places him in a position of exercising managerial function. The Board finds, therefore, that by reason of Clement's duties and responsibilities to the respondent, the student activities co-ordinator should not be included in the academic staff bargaining unit.

C. Vandendriesche – Programmer-Analyst

21. The Programmer-Analyst has contact with students on a regular basis in terms of their use of the college's computer facilities, giving them technical guidance and instructions in that respect. This is not, however, the kind of functional contact with students characteristic of the teaching role of the college. Therefore, were the Board to find Vandendriesche to be an employee under the Act, she would be in support staff bargaining unit, i.e., Schedule 2 and we note the concurrence of the parties with this result. If she is to fall within any of the exclusions of Schedule 2, it would be within either item (iv) or (v).

22. Dealing with the second part of item iv ("persons employed in a confidential capacity in matters related to the formulation of a budget of a college of applied arts and technology or of a constituent campus. . ."), there is no evidence of Vandendriesche having anything to do with the formulation of such budgets. While one could speculate that the college may have these budgets on computer and the Programmer-Analyst may be involved in manipulating the budget data file in order to develop statistics and cost information for use in collective bargaining, the Board can only conclude from the absence of evidence that this is not the case. She does not fall within the exclusion in the second part of item (iv) and for similar reasons we must conclude that she is not excluded by the first part which concerns "persons employed in a confidential capacity in matters related to employee relations. . .". The evidence tells us that she has access to student records maintained on computer data files which may well be confidential in the general sense and that she has access to all of the data files of systems run on the computer whether it deals with "Personnel", a "multi-year plan" or "costing procedures". There is nothing which would support the conclusion that her access to any of the data files constitutes a "... regular, material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer. . .". This is the leading statement from the Board's decision in *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379 which the Board has consistently followed when deciding the same question under section 1(3)(b) of *The Labour Relations Act*. In these circumstances, we find the programmer-analyst not to be excluded by item (iv).

23. Next we turn to the itemized criteria of the sub-section 1(l) to determine whether Vandendriesche is captured by any of those and thereby excluded under item (v) of Schedule 2. We cannot agree with respondent counsel's contention that she formulates policy in respect of the respondent's computer systems and programs. Clearly she taps the computer's processing capability to meet the information needs of the users by designing appropriate systems and writing the programs for their operation, but if she contributes at all (and it is possible that she does) to the formulation of policy in respect of the college's computer facilities, there is not an iota of evidence to this effect. She is not involved in the formulation of

organization objectives or in the formulation of budgets. What was said above about formulation of budgets of the college applies equally to the second aspect of sub-section 1(l)(i). She does not fall within this criteria of the managerial or confidential exclusion, therefore.

24. Vandendriesche gives technical guidance to the computer services staff and to the users of the services. She also requests the staff to execute particular jobs or programs and when this happens, they are responsible to her for doing so. Considering the nature of the supervision and the fact that it occupies ten to fifteen per cent of her time, it does not constitute spending a significant portion of time in the supervision of employees. There is no evidence to suggest that sub-section 1(l)(iii) and (iv) apply to the programmer-analyst's duties and responsibilities. Sub-section 1(l)(v) is the same as the first part of exclusion (iv) of Schedule 2 and therefore does not apply and there is no evidence to cause the Board to exercise its discretion under sub-section 1(l)(vi) to exclude Vandendriesche from the support staff unit.

25. For all of the above reasons we find that Vandendriesche is not excluded by any of the exclusions under Schedule 2 and is, therefore, a member of the support staff bargaining unit.

G. Dumas and A. Favot – Community Program Co-ordinator

26. The duties and responsibilities of the position of Community Program Co-ordinator bear such a strong similarity to those which emerge from the finding of fact in respect of the position of Development Officers dealt with by the Board in *Algonquin College, supra*, that we are attracted to the conclusion that they are essentially the same positions. The Community Program Co-ordinator markets the same kind of training programs to the community and carries out the same responsibilities for organizing and administering these course offerings. Favot supervises two full-time adult training employees, but in terms of the full scope of his job this would not constitute a significant portion of his time being spent in supervision of employees. There is no evidence, either, that Favot is required to deal formally on behalf of the college with a grievance of either of the two full-time employees. On the evidence, we find nothing of significance in the duties and responsibilities of the co-ordinators to distinguish them from the Development Officers in the *Algonquin College* case. Therefore, for the same reason that the Board in that case found the Development Officers to be part of the support staff bargaining unit, we find the Community Program Co-ordinators Dumas and Favot are members of the support staff bargaining unit.

H. Schmidt – Manager Evening Programs

27. The facts in respect of the duties and responsibilities of this position demonstrate that Mrs. Schmidt performs the same job function as the Community Program Co-ordinator and, in addition is responsible for the operation of evening classes at one of the Sudbury campuses. This added responsibility, however, entails dealing with operational problems the nature of which does not project Schmidt into any of the itemized exclusions of Schedule 2 or sub-section 1(l). Therefore we find that the manager evening programs is also a member of the support staff bargaining unit.

D. van Leeuwen – Manager Client Services

28. As the facts indicate, the duties and responsibilities of the Manager Client Services are similar to those of the Community Program Co-ordinator. But van Leeuwen like Schmidt has some additional responsibilities. These extra responsibilities have to do with executing the continuing education programs, co-ordinating the efforts of other members of the division towards meeting the program objectives, and providing liaison with two support departments. His presence on the divisional committee makes him a participant in policy-level decisions, particularly in respect of the utilization of the academic resources of the college for continuing education programs. There is nothing in the evidence about these activities to suggest that van Leeuwen, if found to be an employee, should not be in Schedule 2, as the Co-ordinators are. Moreover, we find no evidence in respect of those responsibilities which distinguish this position from the Community Program Co-ordinator position which suggest that they hold any significance for the college's collective bargaining relationships. They do not serve, therefore, to bring van Leeuwen within any of the itemized exclusions of Schedule 2 or subsection 1(1). The evidence in respect of his responsibility for planning, developing and implementing the strategies for marketing the continuing education programs and his regular participation on the divisional committee in settling policy matters within the continuing education division does, however, distinguish his duties and responsibilities from those of the Community Co-ordinator and the Manager, Evening Programs. These are not duties and responsibilities which are incidental to that part of his job which is the same as the other two, rather they are integral to the total job. The independent decision making authority associated with these added duties and responsibilities, his ability to commit the college to significant expenditures in advertising and contract printing, taken together with the duties and responsibilities which he has in common with Dumas, Favot and Schmidt, clearly identify him with being part of the management team and not part of the bargaining unit. By reason of van Leeuwen's duties and responsibilities to the respondent, therefore, the Board finds that he should be excluded from the bargaining unit pursuant to sub-section 1(1)(vi) of the Act.

C. Sanford – Media Specialist

29. The facts in respect of this position demonstrate that, by reason of Sanford's special skills and knowledge of various communications media and the application of those attributes to the duties and responsibilities of the position, he may be characterized as a person employed in a "technical" capacity. This places him in Schedule 2 should he be found to be an employee. The facts on his duties and responsibilities do not fit him into any of the first three exclusions, so it is a question of whether he is captured by item (iv) or (v) of the Schedule. There is neither any claim nor any evidence that he is affected by the first part of item (iv). While Sanford assists the Dean with the preparation of the budget for the Instructional Media Centre and it appears that he may also recommend what budget provisions need to be made for equipment purchases, this is not a budget of a college or constituent campus. Even if it was, there is no evidence that he is functioning in a confidential capacity. Therefore he is not excluded by item (iv).

30. Do his duties and responsibilities place him within any of the itemized criteria of sub-section 1(1) so that he would be excluded by item (v) of the Schedule? His position involves him in developing individualized learning programs and producing instructional and promotional television programs, but as we found with the Student Activities Co-ordinator, this does not constitute the "... formulation of organization objectives and policy in relation to the development and administration of programs of the employer ...". His activities are

clearly part of the carrying out of objectives and policy and not the formulation of either, so he is not excluded by the first part of sub-section 1(l)(i). In respect of the second part, there is no evidence that his involvement with the Instructional Media Centre budget preparation has any significance for the college's employee relations or collective bargaining relationships such that would exclude him from that part of sub-section 1(l)(i). Sanford has no employees who report to him, but he does instruct and guide media technicians in the production of instructional and promotional programs for which he is responsible. He tells them what results he wants in photography, graphics and sound and assures that he gets those results. His evaluation of their technical performance is given as required, to the supervisor of the Instructional Media Centre. While this activity may occupy as much as 20 per cent of his working time, it is not unlike the technical supervision performed by the Programmer-Analyst when she instructs computer centre staff on the what, when and how of exercising jobs on the computer. In our view this is not the supervision contemplated by sub-section 1(l)(ii), therefore the media specialist is not excluded by that criterion.

31. There is no evidence which would bring him within sub-sections 1(l)(iii), (iv) and (v) and there is nothing about the duties and responsibilities of the position taken in the whole that would justify exclusion under sub-section 1(l)(vi). In the result, we find that the Media Specialist is an employee within the support staff bargaining unit.

32. In summary, the Board finds that within the meaning of the Act, the Programmer-Analyst, Community Program Co-ordinators, Manager Evening Programs, and Media Specialist are employees in the support staff bargaining unit (Schedule 2). It further finds that the Student Activities Co-ordinator and the Manager, Client Services should be excluded from the bargaining units by reason of their duties and responsibilities to the respondent.

33. There is no evidence before the Board from which it can determine whether N. Chouinard, assistant director of athletics and recreation, is in the academic or support staff bargaining unit. The Board will remain seized with that issue in the event that the parties are still unable to resolve it.

1596-79-R Canadian Union of Public Employees, Applicant, v. Charterways Transportation Limited, Respondent, v. Group of Employees, Objectors.

Certification – Membership Evidence – Cards signed on Sunday – Whether contravening Lord's Day Act – Not voiding membership evidence

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members J.D. Bell and A. Gribben.

APPEARANCES: Gilles LeBel for the applicant; Michael Gordon and Terry Craftchick for the respondent; J.A. Ballard for the objectors.

DECISION OF THE BOARD; January 8, 1980.

1. This is an application for certification.

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5. The respondent raised two issues going to the entitlement of the applicant to be certified to represent the employees in the above described bargaining units. The respondent argued firstly, that on his reading of the applicant's constitution the applicant is entitled to represent only public service employees and cannot therefore, represent the employees of a private sector employer such as the respondent. The union replied that under article 3.01(g) of its constitution it extends membership to employees outside of the public sector and cited a number of examples of private sector employee groups represented by it. Section 92(4) of the Act provides:

“Where the Board is satisfied that a trade union has an established practice of admitting persons to membership without regard to the eligibility requirements of its charter, constitution or by-laws, the Board, in determining whether a person is a member of a trade union, need not have regard for such eligibility requirements.”

The Board hereby affirms its oral ruling given at the hearing that even if it was to accept the respondent's reading of the applicant's constitution, which it does not, it is satisfied that the applicant has an “established practice” within the meaning of section 92(4) of the Act of admitting into membership persons not directly employed in the public sector. In the result the requirements of the applicant's constitution are not material to the matter before us.

6. The respondent argued secondly, that the Board should examine the membership cards submitted by the applicant and discount those which had been signed on Sunday, October 28, 1979. If the cards signed on Sunday, October 28, 1979 were to be discounted the Board would be required to dismiss the application for lack of membership support. In support of this contention counsel for the respondent, citing *Astgen et al v. Smith* (1969), 7 D.L.R. (3d) 65, argues that a person signing a union membership card enters into a contractual relationship and citing *Magee v. Channel Seventynine Ltd.* (1977), 85 D.L.R. (3d) 201 argues further that a contract which is entered into on the Lord's day is null and void by virtue of section 4 of the *Lord's Day Act*.

7. Section 4 of the *Lord's Day Act* provides:

“It is not lawful for any *person* on the Lord's Day, except as provided herein, or in any provincial Act or law in force on or after the 1st day of March 1907, to sell or offer for sale or purchase any goods, chattels, or other personal property, or any real estate, or to carry on or transact any business of his ordinary calling, or in connection with such calling, or for gain to do, or employ any other person to do, on that day, any work, business, or labour.” [emphasis added]

8. The argument advanced by counsel for the respondent ignores the nature of the contractual relationship undertaken by a person who signs a union membership card, the legal status of a trade union and in large measure, the language of section 4 of the *Lord's Day Act*. The section does not make it unlawful to enter into a contract on the Lord's day as is

suggested by counsel for the respondent. In order for a contract to be unlawful and hence void by reason of being entered into on the Lord's day it must be found to have been executed in connection with one of the specific activities which are regulated by the statute. A contract executed in connection with an activity which is not regulated by the statute is not unlawful if entered into on the Lord's day.

9. The argument advanced by counsel for the respondent suggests that the signing of a union membership card establishes a contractual relationship between the individual signing the card and the trade union. While a person enters into a contractual relationship upon the signing of a union membership card, the courts have made it clear that it is the members, one to the other, who are related by the contract. (See *Orchard v. Tunney* (1957), 8 D.L.R. (2d) 273 at 281, *Astgen v. Smith*, *supra*, and *Binson v. Johnston* (1957), 10 D.L.R. (2d) 11, *affd.* 12 D.L.R. (2d) 379.) In the last cited judgment the court concisely described the nature of the transaction and its legal effect in the following terms:

“... that a contract is made by a member when he joins the union, the terms and conditions of which are provided by the union's constitution and by-laws The contract is not a contract with the union or the association as such, which is devoid of the power to contract, but rather the contractual rights of a member are with all other members thereof.”

10. It is beyond dispute that the signing of a union membership card does not constitute the selling or offering for sale or purchase any goods, chattels or other personal property or any real estate by either the individual signing the card or by those with whom he is contracting by virtue of signing the card. We are also of the view that the signing of a union membership card cannot be characterized as the carrying on or transacting of any business of the “ordinary calling” of either the person who signs the card or those with whom he is contracting, nor can it be characterized as the carrying on of any business in connection with such calling.” We are supported in our conclusion in this regard by the courts in *Re Warner and Manitoba Labour Board et al*, (1960), 25 D.L.R. (2d) 217. The Court was asked to find that a meeting of trade union employees held on a Sunday at which an application for certification was authorized was contrary to section 4 of the *Lord's Day Act* and therefore a nullity and hence so also was the certification of the Labour Board which had been based upon the authorization. The court, however, came to the conclusion that:

“Surely it cannot be said that the group of men forming the members of Local 330 who met that Sunday to authorize the application for certification were on the business of their ordinary calling, or were carrying on business at all. Undoubtedly they were acting for the purpose of obtaining something they thought would be for their benefit, but that fact cannot be invoked to suggest that they were carrying on business for a profit.” [emphasis added]

The court put its mind to the question of trade union activity vis-a-vis the activities covered by Section 4 of the *Lord's Day Act* and concluded that trade union activity does not constitute business within the meaning of section 4 of the *Lord's Day Act* or any of the other activities referred to in the section. The signing of a union membership card is no more the carrying on of business within the meaning of section 4 of the *Lord's Day Act* than is an authorization by union members to go forward with an application for certification and in

any event, the signing of a union membership card cannot be characterized as business of the ordinary calling of either the individual signing the card or those with whom he is contracting. If a working man can be said to have a "business of his ordinary calling", and we are not of the view that a working man is in business of any kind, that business is not being carried on by the act of signing a union membership card or accepting an individual into membership. The signing of a union membership card does not constitute the transacting of any business of the ordinary calling of either the person signing the membership card or the other members of the trade union with whom the person signing the card is contracting, as would bring the act of signing a union membership card within the ambit of section 4 of the *Lord's Day Act*.

11. The trade union itself, which is the collective of all its members, is not a "person" as defined in *The Interpretation Act*, s. 30(28) and is not, therefore, regulated by section 4 of the *Lord's Day Act*. Even if a trade union was found to be a "person" whose conduct was regulated by the *Lord's Day Act*, however, the courts have made it clear that the business activities referred to in section 4 of the *Lord's Day Act* are those which are carried on for profit (see *Rideau Club v. Ottawa*, (1907), 15 O.L.R. 118 at P. 122 and *Warner and Manitoba Labour Board*, *supra*). A trade union as defined in section 1(1)(n) of *The Labour Relations Act*, does not engage in business for profit and its activities, therefore, would not be regulated by section 4 of the *Lord's Day Act* if it was a "person" covered by the Act.

12. Having regard to all of the foregoing we find that the signing of a union membership card is not an activity which, if done on a Sunday, is made unlawful by the operation of section 4 of the *Lord's Day Act*. ...

16. A certificate will issue to the applicant.

1658-79-R Canadian Union of Public Employees, Applicant, v. Staff Association of Children's Aid Society of Metropolitan Toronto, Respondent, v. Children's Aid Society of Metropolitan Toronto, Intervener.

Successor Status – Whether trade union has complied with requirements necessary to obtain successor status under section 54

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Helen Browne for the applicant; Patricia Martin for the respondent; T. F. Storie and others for the intervener.*

DECISION OF THE BOARD; January 23, 1980.

1. The applicant has applied to the Ontario Labour Relations Board under Section 54 of *The Labour Relations Act* for a declaration that it has acquired the rights, privileges and duties under this Act of its alleged predecessor, the Staff Association of the Children's

Aid Society of Metropolitan Toronto, by reason of a merger or amalgamation or a transfer of jurisdiction. Section 54 of the Act provides as follows:

“(1) Where a trade union claims that by reason of a merger or amalgamation or a transfer of jurisdiction it is the successor of a trade union that at the time of the merger, amalgamation or transfer of jurisdiction was the bargaining agent of a unit of employees of an employer and any question arises in respect of its rights to act as the successor, the Board, in any proceeding before it or on the application of any person or trade union concerned, may declare that the successor has or has not, as the case may be, acquired the rights, privileges and duties under this Act of its predecessor, or the Board may dismiss the application.

(2) Before issuing a declaration under subsection 1, the Board may make such inquiry, require the production of such evidence or hold such representation votes as it considers appropriate.

(3) Where the Board makes an affirmative declaration under subsection 1, the successor shall for the purposes of this Act be conclusively presumed to have acquired the rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.”

2. To decide whether the applicant, CUPE, has acquired the rights, privileges and duties under this Act of its predecessor, the Staff Association, the Board must determine whether a merger or amalgamation, or a transfer of jurisdiction has been properly effected by the predecessor. To this end, the Board looks to the provisions of the predecessor's constitution to decide whether the predecessor had jurisdiction to merge, amalgamate or transfer jurisdiction and, if so, whether it complied with its own procedures for doing so, e.g., notice and voting procedures. In this case counsel for the employer questioned the adequacy of the notice of the contents of the meetings at which the vote to merge, affiliate or transfer jurisdiction was held.

3. Ms. Patricia Martin of the Staff Association gave testimony regarding the events leading up to and surrounding the vote taken among the eligible Staff Association members to decide whether they would merge, affiliate or transfer their jurisdiction to the applicant, CUPE. In April, 1978 the Staff Association distributed material to the membership entitled “A Case for Affiliation” and indicated that the membership would be required to make the very important decision of whether the Staff Association should remain an independent union, merge with a larger union or affiliate with a group of unions. The distribution contained descriptions of CUPE and the Ontario Public Service Employees Union (OPSEU), the two unions suggested for possible merger, as well as a description of the Confederation of Canadian Unions which was suggested as the most likely entity for affiliation. Although a meeting was held and people from CUPE, OPSEU and CCU spoke to the membership, the matter rested in abeyance until September, 1979.

4. A general membership meeting was held on September 25, 1979 at which representatives from CUPE, OPSEU, and CCU again attended to give information and answer

questions relating to their respective unions. The Staff Association newsletter for October, 1979 was sent to all bargaining unit employees on or about October 15th. The first page of the newsletter contains a notice of a general membership meeting to be held on Tuesday, November 13, 1979 indicating that a vote would be taken on three important issues. The newsletter specifically indicates that one of the matters to be voted upon would be "the question of Affiliation/Merger/Independence".

5. A council meeting was held on November 1, 1979 during which a motion was made and carried that council put forth a resolution to the membership to merge with CUPE. In a newsletter distributed by hand to every member of the bargaining unit on November 5, 1979, the membership was notified that a general membership meeting would be held on Tuesday, November 13, 1979 and Wednesday, November 14, 1979. The notice stated that, among other things, the agenda for the meeting would consist of "a vote on the Resolution to merge with the Canadian Union of Public Employees (CUPE)". The notice described the issues to be voted upon as "some of the most important issues ever put before the membership". Following a general discussion of the CUPE Resolution, the newsletter set out, in full, the Resolution which had been passed by the council at the November 1st meeting:

"STAFF ASSOCIATION
OF THE
CHILDREN'S AID SOCIETY OF METROPOLITAN TORONTO
RESOLUTION

BE IT RESOLVED that the Staff Association of the Children's Aid Society of Metropolitan Toronto hereby merges, amalgamates with or transfers its jurisdiction, rights, privileges, duties, liabilities and assets to: The Canadian Union of Public Employees (C.U.P.E.) subject to its Constitution and Rules and Regulations. PROVIDED however, that the Staff Association of the Children's Aid Society of Metropolitan Toronto may and are hereby authorized to continue to use and be known by the present name until such time as a change to a new name has been agreed upon with the Staff Association of the Children's Aid Society of Metropolitan Toronto or until such time as such change to a new name has been made in accordance with the procedure under Section 54 of the Ontario Labour Relations Act.

DATED AND PASSED AT Toronto, Ontario, this 1 day of November, 1979

Signed:

Patricia Martin
Chairperson

Brian Piitz Acting
Secretary"

6. The general membership meeting was held as scheduled on November 13th and

14th for the purpose of voting on the Resolution. The ballot presented to the voters read as follows:

BALLOT

ARE YOU IN FAVOUR OF THE RESOLUTION REGARDING MERGING, AMALGAMATING WITH, OR TRANSFERRING OUR JURISDICTION, RIGHTS, PRIVILEGES, DUTIES, LIABILITIES AND ASSETS TO THE CANADIAN UNION OF PUBLIC EMPLOYEES (C.U.P.E.) AND RETAINING OUR NAME FOR A CERTAIN PERIOD OF TIME?

YES

NO

In the Board's view the ballot is an accurate reflection of the question contained in the Resolution.

7. Following the November 13th and 14th voting the Staff Association received a number of calls from persons who had been caught in the "Mississauga Disaster" and could not, thereby, attend the vote. In view of the unusual circumstances, the Staff Association notified all employees in the bargaining unit on November 15th that the vote would be continued on November 20th.

8. The Board's function under section 54 of the Act is to determine whether the proposed merger, amalgamation or transfer of jurisdiction has been carried out in accordance with the provisions of the predecessor's constitution as well as any additional criteria developed by the Board.

9. Article III(c) of the constitution of the Staff Association provides for a merger, affiliation, or a transfer of jurisdiction and reads as follows:

"III. MEMBERSHIP AND JURISDICTION

- (c) Jurisdiction: If so decided at a General Membership Meeting by a 50% plus 1 vote of the total membership in good standing, the Staff Association may merge or affiliate with, or transfer jurisdiction to, or join another Union or Labour Federation."

Article III(c) of the constitution thereby gave the Staff Association the jurisdiction to decide by a 50 per cent plus 1 vote of the members in good standing to merge, affiliate or transfer jurisdiction to another union.

10. Article III(b) of the By-Laws stipulates that the notice for a General Membership Meeting must be given at least fourteen days prior to the meeting. In this case, the first notice of the General Membership Meeting during which the vote was to be held was contained in the October 15th newsletter or well within the fourteen day time period stipulated in the By-laws.

11. The By-Laws do not provide for extension meetings such as was necessitated by the "Mississauga Disaster". In *Zehrs Markets Division of Zehrmart Limited*, [1977] OLRB Rep. Oct. 637, the Board indicated that apart from the notice requirements in the constitution, the Board must be satisfied that reasonable notice has been given to the union members concerning a meeting called to decide upon a proposed merger, amalgamation, or transfer of jurisdiction (see also *Faulds v. Hesford*, (1957), 10 D.L.R. (2d) 292 (B.C. Sup. Ct.) and *Beef Terminal Limited*, [1970] OLRB Rep. April 75). In view of the circumstances under which the extension meeting occurred in this case and the general awareness of the issue in question, as discussed in more detail below, the Board is fully satisfied that the notice given employees on November 15th for the extension meeting on November 20th was reasonable and, therefore, effective notice for the purposes of section 54 of the Act.

12. Notwithstanding the fact that the notice of the meeting itself was in accordance with the by-laws, counsel for the Children's Aid Society raised the question of whether the membership had received sufficient notice of the contents of the agenda for the meeting at which the vote was to be held. As the constitution is silent on the issue of notice of the contents of a General Membership Meeting, the Board need satisfy itself that reasonable notice was provided. The question of whether the Staff Association should remain independent, merge with CUPE or OPSEU or affiliate with CCU was raised with the membership in April, 1978 both at a membership meeting and in a printed distribution. The matter was again discussed at a General Membership Meeting on September 25th, 1979 during which the membership was addressed by representatives of the respective unions. In the October newsletter, the notice of the November 13th General Membership Meeting clearly indicated that a vote would be taken on the question of "affiliation/merger/independence". On November 5, 1979, one week prior to the first day of voting, a second newsletter was distributed containing a reproduction of the actual Resolution upon which the membership would be asked to vote. In view of the extent to which the matter had been discussed at General Membership Meetings prior to the vote, and having regard to the contents of both the October and November newsletters in their entirety, the Board is satisfied that the membership had a clear understanding, well in advance, of the nature of the matter to be voted on at the November 13th and 14th General Membership Meetings. The Board, therefore, sees no defect in this regard.

13. Article II of the By-Laws stipulates that only members in good standing can vote in the meetings referred to in By-Law I which includes General Membership Meetings. Members in good standing are defined as those members who are paying dues. Article III(b) of the Constitution states that members of the Staff Association are "[a]ll eligible employees who have signed a membership card with the Staff Association and are paying dues ...". These provisions of the Constitution and By-Laws collectively indicate that those who are eligible to vote are employees who have signed a membership card with the Staff Association and are paying dues. Ms. Martin testified that there were 351 eligible voters and that 181 or 52 per cent voted in favour of the Resolution. Article III(c) of the Constitution quoted above stipulates that 50 per cent plus 1 of the total membership in good standing is needed to effect a merger, affiliation or transfer of jurisdiction. The 52 per cent vote in favour of the merger or transfer was, therefore, sufficient to carry the Resolution.

14. On the basis of the evidence set out above, the Board is satisfied that the purported merger or transfer was carried out in accordance with the Constitution and By-Laws of the Staff Association and in compliance with the Board's general criteria for assessing the effectiveness of such a transaction.

15. Accordingly, the Board finds, and so declares pursuant to section 54(1) of *The Labour Relations Act*, that the applicant, the Canadian Union of Public Employees, has acquired the rights, privileges and duties under *The Labour Relations Act* of the Staff Association that was the exclusive bargaining agent for the employees of the Children's Aid Society of Metropolitan Toronto.

0266-79-R Retail Clerks Union, Local 206, chartered by Retail Clerks International Union, A.F.L.-C.I.O.-C.L.C., Applicant, v. **Darrigo Consolidated Holdings Inc.**, Respondent.

Sale of a Business – Food store closed more than 14 months – Lease transferred to successor – Whether a sale of a business

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and C. Balentine.

APPEARANCES: *Ted Wohl and Charles McCormick for the applicant; Michael Gordon and John Darrigo for the respondent.*

DECISION OF THE BOARD; January 15, 1980

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2. This is an application brought under section 55 of *The Labour Relations Act* for a declaration that there has been a sale of a business from Dominion Stores Limited ("Dominion") to the respondent Darrigo Consolidated Holdings Inc. ("Darrigo") within the meaning of the Act. The applicant is seeking also a declaration from the Board that it is the bargaining agent for the employees of Darrigo in like bargaining units to those for which it was bargaining agent at Dominion and an order that Darrigo bargain with the applicant in accordance with notice given under section 55(3) of the Act. The application came on for hearing first on June 19, 1979 and following an adjournment granted to the applicant upon the consent of Darrigo, was continued for hearing on November 26, 1979.

3. The majority of the facts in this case are not in dispute. Dominion operated a retail food store in the K-Mart Plaza in Kitchener, Ontario from September 1963 until December 31, 1977 in premises which it held under lease from Cambridge Leaseholds Limited ("Cambridge"). Dominion was operating the store at the time of closing for K-Mart Canada Limited under the name of K-Foods. When the store closed, Dominion laid off all of the employees. Dominion surrendered its lease to trustees of Cambridge on October 31, 1978 and effective November 1, 1978 the premises were leased by Cambridge to Darrigo. Darrigo occupied the premises December 15, 1978 and opened the store for business in March 1979. The store was vacant at all times from December 31, 1977 until December 15, 1978. All merchandise had been removed by Dominion upon closing and all signs which would identify the premises with either Dominion or K-Foods were removed at the time. There is no evidence as to when the store fixtures were removed but they had been removed by October 31,

1978. There were no signs on the premises indicating that they were available for lease or purchase during the vacancy. Except for the store premises, Darrigo did not acquire anything which previously had belonged to or been used by Dominion, nor are any of Darrigo's employees former Dominion employees. Darrigo, Dominion and Cambridge are not linked corporately.

4. The Board is satisfied upon the evidence that, at the time the store was closed, the applicant held bargaining rights for employees of Dominion in two bargaining units, pursuant to the terms of the collective agreement which expired June 21, 1978. One unit consisted of full-time employees and the other of part-time employees. The applicant duly notified Dominion on April 22, 1978 of its desire to negotiate renewal of both agreements. New agreements were executed December 5, 1978 to have effect for the term November 20, 1978 to June 21, 1980. The renewal agreements like their predecessors cover several bargaining units and they use the same language as their predecessors to describe these units in terms of the employees employed in stores owned and operated by Dominion in separate bargaining units at Guelph, Kitchener, Waterloo and the K-Mart Plaza.

5. Section 55 of the Act provides that when a business or part of a business is sold, leased, transferred or otherwise disposed of the successor in the transaction is, until the Board declares otherwise, bound by the same collective bargaining obligations by which the predecessor was bound. The provisions of the section relevant to this matter are:

“(1) In this section,

- (a) ‘business’ includes a part or parts thereof;
- (b) ‘sells’ includes leases, transfers and any other manner of disposition and ‘sold’ and ‘sale’ have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a col-

lective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires.”

An application under this section poses two questions. First, has there been a sale within the definition of subsection 1. Second, if there has been a sale, is the subject of that sale a business or part of a business of the vendor.

6. Counsel for Darrigo contends that there has not been a sale as defined by section 55(1), rather there has been a legal surrender by Dominion of its lease to Cambridge and the issuing of a lease by Cambridge to Darrigo. In the alternative, should the Board find that there has been a transfer of Dominion’s lease to Darrigo, counsel argues that none of the other factors which the Board has considered to be useful in determining whether particular fact situations reveal a sale of a business are present in this case and the simple transfer of a lease standing by itself does not constitute a sale of a business. Counsel argued that to find otherwise would be to say that bargaining rights attached themselves to property (as opposed to a business as the Board’s jurisprudence shows) and transfers with the property.

7. The Board has consistently looked to the substance and not the form of the transactions in a purported sale of a business to determine whether, in fact, a sale has taken place. In this respect, see the authorities cited by the Board at paragraph 28 of its decision issued December 18, 1979 in *Metropolitan Parking Inc.*, Board File No. 0524-79-R, as yet unreported, and its statement contained therein that “The manner of disposition is irrelevant so long as a transfer has, in fact, taken place. The interposition of a third party, acting as an agent or conduit, does not affect the result.”. In the case at hand, having considered the evidence in respect to the nature of Cambridge’s lease to Darrigo (notwithstanding some differences in its conditions compared with Dominion’s lease), the timing of the lease transactions and Dominion’s role in finding a tenant acceptable to Cambridge, the Board is satisfied that, in substance, Dominion has effected a transfer of its lease to Darrigo even though the commercial form of the transfer involves the surrender of Dominion’s original lease and the signing, by Darrigo, of a new but similar lease. The essence of the transaction is as though Dominion’s right to use the premises was transferred directly to Darrigo. We are satisfied that this commercial arrangement constitutes a “transfer” or “sale” of the leased premises within the extended meaning which the Board has given to the word “sale” in section 55 since its decision in *Thorco Manufacturing Ltd.*, 65 CLLC ¶16,052.

8. Since there has been a sale from Dominion to Darrigo, was it Dominion’s business or a part thereof that was the subject of the sale? Darrigo has acquired, via the transfer of Dominion’s lease, the exclusive right to use the premises previously operated by Dominion as a retail food store. The Board, over many years, in determining whether there has been a sale of a business in the retail food industry, has considered the occupation by the successor of the premises previously occupied by the predecessor to be a very significant factor. The Board’s comments in *Dominion Stores Limited*, [1979] OLRB Rep. July 626, at paragraph 7, places the factor in perspective with some of the other factors considered indicative of any sale of a business.

“The Board has made certain observations about the nature of the retail food industry in its section 55 jurisprudence. The Board has noted that goodwill may consist in large measure ‘in the habit of customers of

the vendor continuing to patronize the food market located on the same premises' and therefore exemption of goodwill from the purchase price where the successor occupies the same premises has no real meaning. Similarly, the Board has commented that 'it is to be expected that one chain food store would not be interested in acquiring the foodstuffs and inventory of another chain food store' and accordingly, the failure to purchase foodstuffs and inventory is of no real significance when such a transaction occurs. Finally, the the Board has commented that 'it is generally necessary to shut down operations at the time of a sale in order to give the new owner an opportunity to make renovations which are in accord with its particular method of merchandising' and to stock the premises and accordingly, the Board should not give undue weight to an hiatus of operation at the time of the alleged sale. (See *Dutch Boy Food Markets* 65 CLLC ¶16,051 and *Gordons Markets supra* and the cases referred to therein)."

9. While consideration of the Board's jurisprudence in section 55 cases is helpful in gaining perspective, in each case it remains to be determined on its own facts whether there has been a continuation of the predecessor's business; i.e., in this case, has Dominion's business continued in the hands of Darrigo. The continuation of the predecessor's business is important because the applicant's bargaining rights are attached to it and are dependent upon its continuation under Darrigo. What we have, in summary, in this case is Dominion closing a retail food store during its fifteenth year of operation by Dominion and disposing of the lease for the store to Darrigo via Cambridge. There is no corporate connection between Dominion and Darrigo or between either of them and Cambridge. The premises were closed for more than 14 months and vacant for 11 1/2 months with no visible signs that they would or would not be reopened as a food store. Nothing of tangible value passed from Dominion to Darrigo other than the lease. In these circumstances and in all the circumstances of this case the Board finds that the acquisition by Darrigo of Dominion's lease and the occupation of the premises vacated by Dominion for the purpose of operating a retail food store does not constitute a continuation of Dominion's business. Therefore there has not been a sale of a business within the meaning of section 55 of the Act and Darrigo is not the successor of Dominion with respect to the applicant's established bargaining rights with Dominion.

10. The application is dismissed.

1014-79-R Restaurant, Cafeteria and Tavern Employees Union, Local 254, of the Hotel and Restaurant Employees and Bartenders International Union, Applicant, v. **Domco Foodservices Limited**, Respondent, v. Retail Clerks Union, Local 409, Intervener.

Build-Up – Certification – Board advised of build-up and ordering vote – Board expecting parties to present all facts relevant to certification to Board

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J.A. Ronson and W.F. Rutherford.

APPEARANCES: *Douglas J. Wray and J. D. Sobolewski for the applicant; John P. Sander-son, Q.C. for the respondent; Lynn King and Jeff McNullen for the intervener.*

DECISION OF THE BOARD; January 2, 1980

1. This application for certification was first heard on September 18, 1979. At that hearing counsel for the respondent advised the Board that it anticipated a build-up of the work force. It was expected that the bargaining unit, then numbering nine employees, would grow to include 35 employees within a two or three month period. At that time the respondent did not ask the Board to apply its normal build-up principles to the application and the applicant took no position on that issue.

2. On occasion the Board is faced with clear evidence that a number of employees in an industrial bargaining unit on the date of an application for certification is not a substantial and representative segment of the work force to be employed. The Board may then order the taking of a representation vote to be held at a time when the build-up of the work force is far enough advanced that the wishes of the employees who will comprise the bargaining unit can be fairly determined. There must be a definite planned or scheduled expansion of the work force to take place within a reasonable and specified time, usually not exceeding a year. (*Emil Frant* 57 CLLC ¶18,057; *McCord Corporation* [1965] OLRB Rep. June 203; *Wix Corporation Limited* [1975] OLRB Rep. Aug. 637; *F. Lepper & Son. Ltd.* [1977] OLRB Rep. Dec. 846). Bearing in mind the tentative nature of any plan, the Board requires at a minimum that there be a real likelihood of build-up, and generally regards 50 per cent of the projected work force as constituting a representative segment of the employees for the purpose of certification. (*McCord Corporation (supra)*; *B. F. Goodrich Canada Limited* [1970] OLRB Rep. Sept. 655; *Cornwall Spinners Limited* [1975] OLRB Rep. Sept. 695)

3. By its decision dated October 3, 1979 the Board stated:

“12. At the hearing the Board took no issue with the agreement of the parties that the number of employees was sufficiently representative. Upon further consideration however, we have some concern. In an application for certification where one of the parties has put the Board on notice that a substantial build-up of the work force is likely the Board must, quite apart from any agreement of the parties, satisfy itself that the certificate it issues is based on the wishes of a number of employees who are sufficiently representative of the employees who will eventu-

ally comprise the bargaining unit. In this case if the respondent's representations are borne out by direct evidence, the Board would have some difficulty accepting that nine employees are a substantial and representative sampling of a work force that is expected to increase to 35 within a matter of weeks.

13. There being no direct evidence before the Board which the applicant could challenge, it would be unfair for the Board to treat the case as though build-up was established. In this case the Board should have some evidence from the respondent on any planned build-up in order to assess the merits of the application. The Registrar is therefore instructed to list this matter for a continuation of hearing. The purpose of the hearing will be to allow the respondent to adduce evidence of any plans to increase the number of employees in the bargaining unit. The applicant shall be given the opportunity to respond to such evidence."

4. In the interim the Retail Clerks Union, Local 409 having been denied standing at the first hearing for lack of any membership among the employees, sought to intervene on the basis that it now has as a member an employee hired since the first hearing. The sole purpose of the intervention at this time is to request the taking of a one way representation vote to verify the support of the applicant in light of the build-up. Neither the applicant nor the respondent objected to the standing of the Retail Clerks to intervene for that purpose.

5. At the second hearing counsel for the respondent advised the Board that there are now 35 employees in the bargaining unit. That representation was not challenged by either the applicant or the intervener.

6. In every application for certification the Board has a duty to satisfy itself that the applicant trade union commands the support of the required percentage of a representative number of employees. Therefore when the Board is put on notice by a party that there are firm plans to implement an immediate and substantial increase in the work force it may of its own motion apply its normal build-up principles and order a representation vote to be taken when the build-up is far enough along that the will of the majority of the employees who will occupy the bargaining unit can be determined. (See *McCord Corporation* [1965] OLRB Rep. June 203). By doing so the Board is merely implementing the majoritarian principles fundamental to the granting of bargaining rights under the Act.

7. Admittedly, neither the Board's form for a union's application for certification nor the employer's reply form contains any question which specifically solicits information about a possible build-up of the bargaining unit. Nor does the Board of its own motion normally make such inquiries at certification hearings. That is not to say, however, that the Board will not do so in appropriate circumstances, nor that it will hesitate to reconsider a certification if it should subsequently be disclosed that at the time of the application, whether by ignorance or by design, the parties failed to advise the Board of an impending build-up of which they had knowledge. The Board therefore expects the parties before it in certification proceedings to bring all pertinent information to the Board's attention with the kind of candour exhibited by counsel for the respondent in this case.

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9. Having regard to the build-up of the work force in the bargaining unit from 9 employees at the date of application to 35 employees at the present time the Board is satisfied that it should exercise its discretion to conduct a representation vote among the employees presently working in the bargaining unit.

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12. The matter is referred to the Registrar.

0905-79-R Service Employees' International Union, Local 183,
Complainant, v. **Hallowell House Limited**, Respondent.

Damages – Discharge for Union Activity – Section 79 – Board awarding interest on compensation for loss of wages – Calculation of interests determined

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *H. Goldblatt, J. Nichols and Don Burshaw for the complainant; Ian W. Brady, Barney Hepburn and Doreen Hepburn for the respondent.*

DECISION OF THE BOARD; January 21, 1980

1. This is an application filed under section 79 of *The Labour Relations Act*. The union alleges that the grievor, Lorraine Sallans, was discharged by the respondent nursing home, Hallowell House Limited, contrary to section 58(a) of the Act which reads as follows:

“No employer, . . . ,

(a) shall refuse . . . to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.”

2. Hallowell House is a small nursing home with approximately 66 resident patients and approximately 50 employees. The union does not dispute the respondent's position that Hallowell House is a well equipped, well staffed nursing home with high nursing care standards. The Home is run jointly by Mr. Bernard Hepburn, the Administrator, and Mrs. Margaret Hepburn, the Director of Nursing in charge of patient care.

3. Lorraine Sallans was employed as a part-time nurses' aide for approximately one year before she was discharged. The Hepburns, the head nurse and fellow employees all described Ms. Sallans as a good worker. Mr. Hepburn stated that she did a good job as a nurses' aide, that she treated patients well and that she was neat in her appearance. The Hepburns' complaint, however, was that she was loud and used abusive language.

4. On August 2, 1979 Mr. and Mrs. Hepburn jointly decided to discharge Ms. Sallans and to communicate that decision to her through the following letter:

“August 2, 1979

Dear Mrs. L. Sallans:

It has come to my attention that you have over the past few months used abusive language to our residents and also have been very loud on other occasions. I realize that in this type of industry it is sometimes hard to control one's temper but we must.

It is therefore with regret that I inform you that your services will no longer be required by Hallowell House as of August 2, 1979.

We enclose your payslip, separation certificate, vacation pay and also 1 week's separation pay in lieu of notice.

Yours very truly,

B. C. Hepburn

Administrator”

The following day, August 3rd, Mr. Hepburn summoned Helen Hineman, a member of the grievance committee, into his office to inform her of Ms. Sallan's dismissal. Ms. Hineman stated that she was completely stunned by the decision as there had been no indication that Ms. Sallans' employment was in jeopardy. Ms. Sallans found out about the decision the same evening when she went to the Home and was queried about why her name had been taken off the work schedule. She telephoned Mr. Hepburn to find what had happened and was told that her services were no longer required, that he did not want to discuss it and that there was a letter in the mail.

5. The employees' handbook states that ordinarily an employee will be given two weeks notice if the nursing home decides to terminate services. For exceptional cause, however, the handbook states that an employee may be dismissed without notice. The use of crude language is itemized as one of the exceptional causes. Both Mr. and Mrs. Hepburn testified that they discharged Ms. Sallans without notice because she had violated the high nursing home standards by using abusive language and swearing at a patient. It became evident at the hearing that though alleged loudness was set out in the letter of discharge as one of the reasons, it was in fact only a supporting consideration. Ms. Sallans' alleged swearing at a patient was clearly stated to the Hepburns' primary concern.

6. Mr. Hepburn testified that Ms. Sallans' use of crude language first came to their attention on July 24th when Frances Dainard, a housekeeper employed at Hallowell House, told the Hepburns that Ms. Sallans had come to her house the day before and used offensive language. Mrs. Hepburn's notes of Ms. Dainard's account read as follows:

“Tuesday, July 24, 1979

At 5:00 p.m. Lorraine Sallans came to my house uninvited with a Joan Bradley – rang door bell. I opened the door and Lorraine Sallans said to me, ‘What and hell are you telling stories from Hollowell House.’ This was re Joan Bradley wearing a bikini to my sisters.

She said ‘I don’t have to work for those sneaking Hepburns.’ My daughter said, ‘Why do you?’. She continued to swear at me and said I was riding her back at Hollowell House – If you think you have problems now you will have more and told me none of the staff at Hollowell House could stand me. Mrs. Sallans used very abusive language and I did ask her to leave. My husband was in the back yard, he heard the commotion, it was so loud and came up to the house to see what was going on.

Mrs. Bradley’s husband arrived on the scene and also started calling out abusive language. Mrs. Sallans and Mrs. Bradley in total time were there about 20 minutes.

Mr. Jack Brown a neighbour heard all this commotion.

‘Frances Dainard’”

7. During the course of the Hepburns’ interview with Ms. Dainard, she stated that Betty Way, also a housekeeper employed at Hollowell House, had heard Ms. Sallans use the same kind of language. The Hepburns then asked Ms. Way to come into the office. The report drawn up at that meeting reads as follows:

“Report dated July 25, 1979

Several months ago while Mr. & Mrs. Morely Maracle was [sic] visiting their mother, Mrs. Lorraine Sallans was working with a resident [M.B.] several rooms down from Room 116 on the opposite side of Green Block Hall. Mrs. Lorraine Sallans was yelling and using foul language at this resident and also sounded like she was using physical abusive means too. Mrs. Betty Way was in Room 115 with the Maracles and they just stood there and shook their heads upon hearing this commotion. Mrs. Betty Way went to Mrs. Sallans and told her not to use such language as there were visitors in the Building. Mrs. Sallans told Mrs. Way that ‘I don’t give a Goddamn.’ Mrs. Betty Way just turned and walked away.

‘Betty Way’”

8. In reviewing Ms. Sallans’ file before discharge, Mr. Hepburn testified that he found that Ms. Sallans had been warned about her loudness by Ms. Barbara Purtelle, the head nurse, on July 11, 1979:

“July 11/79

I spoke to Lorraine Sallans this a.m. about hollering in corridors as I was in Room 120 I could hear her voice on Green Block.

She admitted she had a temper but said she would quit if she couldn't have more help with No. 4 area.

She had [resident A] on Bathroom who was finished and ready to come off. She had [resident B] in the bathroom on white block.

[Resident C] was hollering help (she wanted a humbug). [Resident D] was almost falling in corridor and [resident E] had an involuntary Bowel Movement in room.

Lorraine said she had her call bell but by the time she could get to white block for a commode [a toilet chair] it was too late.

Lorraine said she didn't get any help from float [a roving nurse available for general assistance] yesterday when she was in same area. I asked if she has said anything to Mrs. Cameron and she said not but she did tell the float that next time she was on No. 4 she wouldn't get any help from her.

She also said we are short of commodes.

'B. Puretllle'

'Lorraine Sallans''

9. At the time he made his decision to discharge Ms. Sallans, Mr. Hepburn confirmed that his knowledge of Ms. Sallans' alleged misconduct was limited to the reports quoted above and that he made no further investigation.

10. Mrs. Hepburn, however, stated that after reading the report of Ms. Way, she spoke to the resident in question, M.B., to find out if the incident had in fact occurred. Mrs. Hepburn testified that M.B. told her of a disagreement with Ms. Sallans when the staff were trying to clean her drawers and another encounter when Ms. Sallans became angered when M.B. got her bed wet. Mrs. Hepburn gave no details as to what, if anything, M.B. said actually happened during those encounters. When Ms. Sallans was asked about her knowledge of the incidents, she testified that she could not recall an instance when M.B. got her bed wet but did recall a time when she objected to the staff performing their routine task of cleaning drawers. On that occasion Ms. Sallans sought the assistance of the charge nurse who then cleaned the drawers with a garbage bag. Ms. Sallans denies that she ever used abusive language during this incident. Mrs. Hepburn indicated that when she made her decision to discharge Ms. Sallans she considered only the matters referred to above, that is, the Dainard report, the Way report, the Purtelle letter and what appears to have been a rather vague conversation with M.B. which, in the Board's view, did not in fact substantiate the Way report.

11. Both Mr. and Mrs. Hepburn conceded that they never spoke with Ms. Sallan

prior to her discharge to verify the accuracy of any of the alleged incidents upon which they relied. They never, for example, asked Ms. Sallans for her version of what transpired at Ms. Dainard's residence. More importantly, in view of the Hepburns' testimony that Way's report was the key element in concluding that Ms. Sallans had violated the Hallowell House standards prohibiting the use of crude language, they never asked Ms. Sallans whether the incident referred to by Ms. Way had in fact occurred. Neither did they check with either the visitors who were alleged by Ms. Way to have heard the foul language, the patient being visited or the charge nurse on duty at the time. Concerning the July 11th memo in Ms. Sallans' file from Ms. Purtelle, Mr. Hepburn further conceded that he never spoke with Ms. Sallans about its contents.

12. Regarding Ms. Sallans' record the evidence is consistent that she was never criticized for her work performance or her conduct at Hallowell House, that she was never given a verbal reprimand for loudness or crude language and that up until the moment of her discharge she had never been told of any complaints about her treatment of the patients or her conduct as a nurses' aide. When asked why she had not spoken to Ms. Sallans about being loud, Mrs. Hepburn said she was "too busy to do everything [herself]."

13. Ms. Sallans' involvement in the union organizing campaign at Hallowell House is uncontradicted. She had an initial meeting with the union organizer, Mr. John Nichols, in May, 1979 and became his contact at the Home. She spoke with the women at Hallowell House to see if they were interested in having a union and gave Mr. Nichols the names, addresses and phone numbers of employees who indicated an interest. Numerous witnesses who testified on behalf of the company as well as the union stated that Ms. Sallans' involvement in the union was common knowledge. Helen Hineman, for example, said, "You didn't mention union without mentioning Lorraine Sallans". Ms. Janice Wilkes, the assistant administrator who testified for the respondent, testified that she was told by more than one person in June, 1979 that Ms. Sallans was actively involved in trying to get the union into Hallowell House and was working with Mr. Nichols to that end. She stated that when she told Mr. and Mrs. Hepburn about it, they said that they already knew. Mr. Hepburn himself testified that the union came to his attention sometime in June through approximately six staff members. He stated that part of the rumour was that it was Ms. Sallans, along with a couple of other employees, who was trying to organize the employees at Hallowell House. In view of the consistent testimony that Ms. Sallans' involvement in the union was common knowledge, the Board has great difficulty accepting Mrs. Hepburn's contention that she had not heard about Ms. Sallans' involvement in the union prior to deciding to discharge her.

14. On July 4th, 1979 Ms. Hineman convened a meeting of employees at the Fireside Inn. In her assessment the bickering among employees over whether or not they should have a union was making it more and more difficult to work. She wanted a meeting where Mr. Nichols could speak to the employees about the union so that they could then resolve the matter one way or the other through a vote. Following Mr. Nichols' comments at the meeting, Norma Bongard, a registered nurses' assistant and assistant staff supervisor, asked Mr. Nichols to leave so that she could address the employees. The employee handbook states that Ms. Bongard has the authority to hire and fire employees and numerous employees testified that they regarded her as part of management. By her own testimony, it became clear that she informed the gathering of the disadvantages of the union. While she stated that she explained her view of what might happen if the union came in, Ms. Hineman and Ms. Sallans testified that she read out a list of unpleasant things that would in fact happen if

the union came to Hallowell House. At the completion of Ms. Bongard's speech the employees voted against the union. It is common ground that immediately following the vote Ms. Wilkes called the Hepburns and invited them down to the Inn to celebrate. Mr. Hepburn testified that he was told that three employees has voted for the union with the rest voting against, but maintains that he was not told who had voted which way.

15. Both Mr. and Ms. Hepburn testified that they thought that the meeting at the Fireside Inn on July 4th marked the end of the union organizing campaign. They asserted that they were unaware of any union activity that persisted thereafter or up until the time of Ms. Sallans' discharge. The evidence clearly establishes, however, that union activity continued after the July 4th meeting. Ms. Sallans testified that after the meeting she approached about half the girls to find out how they thought the meeting had gone and to ask them to speak with her if they changed their minds and wanted to support the union. The Board accepts her uncontradicted testimony that at the time of her discharge she was still in the process of speaking with fellow employees about supporting the union. The evidence further indicates that a second petition in opposition to the union was circulated after July 4th by Ms. Bongard and Caroline Massey, both of whom testified that the reason for this petition was that they wanted to counteract the union rumblings that were continuing after the July 4th meeting. Ms. Massey, a witness for the respondent, agreed that the continuation of the union activity following July 4th would have been common knowledge. By Mr. Hepburn's own testimony it was established that approximately a week to ten days after the July 4th meeting he asked Ms. Bongard for a copy of the petition. He said he asked for it because he thought it would be interesting to see who had signed the petition to learn how many people thought he had been doing a good job and didn't need a union.

16. On August 7th, Ms. Sallans received her letter of discharge and Ms. Hineman, a member of the grievance committee, arranged an immediate meeting with the Hepburns to discuss the discharge. Lois Finchman who is another member of the grievance committee, Janice Lyons, a fellow employee, and Ms. Sallans were also in attendance. Mrs. Hepburn acknowledged that she had a tape recorder running during the meeting and Mr. Hepburn acknowledged that it was the first time they had taped such a meeting. Ms. Sallans and Ms. Hineman testified that when Ms. Sallans asked why she had been discharged Mrs. Hepburn replied, "Oh come on Lorraine, you know, everybody else does". When Ms. Sallans said that she didn't know and that her reason for being at the meeting was to find out why she had been dismissed, Mrs. Hepburn stated that there had been a complaint by a resident's family and she thought it was her duty to fire her.

17. Additional evidence relating to this meeting establishes beyond any doubt that although the employees asked for specifics relating to the person at whom Ms. Sallans was alleged to have sworn, what was alleged to have been said and when the alleged incident occurred, they received no answers. With respect to the time of the incident, Ms. Sallans and Ms. Lyons each testified that at first Mr. Hepburn said that the incident had occurred a couple of weeks ago, that later in the meeting he said it had occurred approximately a month before and that at the end of the meeting, he said it was quite a while back.

18. In a complaint of this nature filed under section 79 of the Act, the provisions of section 79(4a) apply which place the burden of proof on the employer to show, on the balance of probabilities, that it did not discharge the grievor for union activity or through an anti-union animus. In *Fielding Lumber Company Limited*, [1975] OLRB Rep. Sept. 665 at page 673, the Board explained the burden of proof on the employer in the following terms:

“Having regard to section 79(4a) a respondent employer must satisfy the Board that in taking the actions it took it was in no way motivated by a grievor’s union activity. Thus the Board may not find that an employer’s sole reason for acting stems from the union activity of his employees to find a violation of legislation but rather an employer must satisfy the Board that the union activity played neither a major or minor role in regard to its impugned actions.”

In *The Barrie Examiner*, [1975] OLRB Rep. Oct. 745 the Board at page 749 further explained the effect of the reverse onus of proof and stated that to discharge the onus the employer was required to establish two fundamental facts:

“... first, that the reasons given for discharge are the only reasons and, second, that the reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred.”

19. Seldom will an employer admit that it has been motivated by anti-union animus in discharging an employee. The Board, therefore, is required to draw its own conclusion as to the employer’s motivation and in doing so must draw inferences from the evidence. In discharging an employee, the Board looks for a reasonable explanation for discharge. If the employer provides little or no explanation for terminating an employee and there is concurrent evidence of union activity the Board may, depending on the circumstances, draw the inference that the employer had an anti-union animus and acted in violation of the Act. If the employer establishes good cause for discharge on the other hand, the Board will normally require more cogent evidence of union activity, the grievor’s participation in the campaign and the employer’s knowledge of it before being willing to draw an inference of anti-union motivation. The evaluation of the adequacy of the employer’s reasons for discharge is not aimed at determining whether the employer had just cause for discharge but is rather a step in the more complex process of ascertaining the employer’s motivation. While unfair discharge does not itself establish a violation of the Act, it may be evidence from which the Board will, in certain circumstances, draw an inference of anti-union animus.

20. In this case the employers, Mr. and Mrs. Hepburn, testified that they discharged Ms. Sallans primarily because she swore at a patient. Counsel for the respondent described the significance of the Dainard report which related to an incident outside the Home as being the incident which led to the investigation turning up the crucial Way report alleging that Ms. Sallans had sworn at a patient. Mr. Hepburn indicated that it was these incidents that prompted them to look into the file and discover the Purtelle memo which he characterized as a warning to Ms. Sallans for her loudness. He stated that this report further supported their conclusion that Ms. Sallans was not an appropriate employee for Hallowell House. In his argument, counsel for the employer further suggested that Ms. Sallans’ continual use of “Madam Butterfly” as a name for M.B. was inexcusable name-calling and a reason for discharge. The Hepburns themselves, however, did not in their testimony indicate that they held Ms. Sallans’ pet name for M.B. against Ms. Sallans.

21. Concerning the Purtelle memo, the Board cannot accept, either that it was a warning to Ms. Sallans or that the Hepburns could reasonably conclude from it that Ms. Sallans had acted contrary to the standards of Hallowell House. The memo recounts an inci-

dent when Ms. Sallans was without assistance in the No. 4 area and was faced with the frustration of having five residents calling on her at once, each with a problem requiring immediate attention. The memo refers to "hollering in corridors." Viewing the memo in its entirety, the Board concludes that the most logical inference to draw from this reference is that Ms. Sallans was calling for help. The Hepburns' awareness of the inadequacy of the situation in the No. 4 area where Ms. Sallans was working that day was evidenced by the fact that the problems related to that area were recognized, discussed and rectified at a staff meeting which took place on the evening of the day in question. In view of the uncontradicted nature of the testimony concerning the meeting, the Board does not accept that the Purtelle memo could reasonably have been relied on by the Hepburns to support the discharge of Ms. Sallans.

22. With respect to the more important Way report alleging that Ms. Sallans had sworn at a patient, the Hepburns, as with the Purtelle memo, admit that they never asked Ms. Sallans for her account of the alleged event. Not only did they decline to ask Ms. Sallans, but also they neglected to question the head nurse and the family visiting the resident in question. We accept Mrs. Hepburn's evidence that she asked the resident in question about the incident. As stated above, in the Board's view, the resident's account to Mrs. Hepburn did not substantiate the Way report. In any event, to seek out and allegedly rely on the comments of the resident in the circumstances of this case, to the complete exclusion of Ms. Sallans, the head nurse and other alleged and potential witnesses, does not reflect the attitude of a responsible employer and causes the Board grave doubts as to the veracity of the Hepburns' statement that they discharged Ms. Sallans because she swore at a patient.

23. The Board's suspicions about the Hepburns' motives for discharging Ms. Sallans are further raised by the fact that at the meeting convened to discuss Ms. Sallans' discharge with the grievance committee and Ms. Sallans, no details whatsoever were forthcoming from the Hepburns to enlighten Ms. Sallans on what she was alleged to have said, to whom and when. If the Hepburns were actually discharging Ms. Sallans because they believed she had sworn at a patient, the Board would expect that they would have provided her with the details of the alleged incident to allow her to give her version of what had transpired.

24. Ms. Sallans was the single most active union supporter among the employees. Mr. Hepburn agreed that he knew of the union campaign and that he was aware of Ms. Sallans' leading role in it. Having regard to the admission of virtually all witnesses, including those for the respondent, that her participation was common knowledge, Mrs. Hepburn's denial that she knew of Ms. Sallans' participation in the union campaign is not credible. Additionally, although the Hepburns would have the Board believe that they were unaware of any union activity after the July 4th meeting, Mr. Hepburn admitted that approximately a week or two prior to Ms. Sallans' discharge he asked for a copy of the second petition in opposition to the union which had been circulated after the July 4th meeting. On the basis of this and other evidence, the Board has little difficulty concluding that he was well aware of the union activity which continued after the July 4th meeting up until the time of Ms. Sallans' discharge. Witnesses for both parties agreed that once Ms. Sallans was discharged the union activity ceased altogether.

25. The Board accepts the testimony of Ms. Sallans and Ms. Hineman that when Ms. Sallans asked why she was discharged Mrs. Hepburn said "Come on Lorraine, you know, everybody else does". As it is obvious on the face of the evidence that neither Ms. Sallans

nor any of the other employees at the meeting knew the details of the alleged swearing incident, the Board concludes that the most reasonable interpretation of that comment in the context of all the circumstances of this case is that Mrs. Hepburn was referring to Ms. Sallans' union activity which everyone, except Mrs. Hepburn, agrees was common knowledge. Throughout the hearing the Hepburns and counsel for the Hepburns emphasized the high standards maintained by the Hepburns at Hollowell House. If the Hepburns in fact discharged Ms. Sallans for the reasons given, the Board would have no choice but to conclude that their reliance on the unconfirmed incident in question and the evasive manner in which they sought to justify the discharge to Ms. Sallans and the grievance committee was not that of a responsible employer who wanted to maintain high standards at the Home.

26. Having regard to all the evidence, the Board readily concludes that the Hepburns discharged Ms. Sallans for her role in trying to bring the union to Hollowell House. In reaching this conclusion the Board notes particularly Ms. Sallans' leading role in the union campaign, the Hepburns' knowledge thereof, the absence of virtually any investigation of the incident(s) upon which the Hepburns contend they relied to discharge Ms. Sallans, the blatant unfairness with which the Hepburns refused to enlighten Ms. Sallans on the details of the alleged incident, Ms. Sallans' clean record and the admission by one and all that she was a good worker. In discharging Ms. Sallans for an anti-union animus the Hepburns have violated the provisions of section 58 of *The Labour Relations Act* and the Board so finds.

27. Pursuant to this finding the Board orders that Lorraine Sallans be reinstated forthwith both into the position she held upon her discharge and onto the shift she was working at that time. The Board further orders that she be fully compensated for all lost wages and benefits sustained through the employer's violation of the Act.

28. To fully compensate Ms. Sallans for the financial loss she suffered through the employer's violation of the Act, the Board, consistent with its recent decision in *Radio Shack*, [File No. 1004-79-U, decision dated December 5, 1979, as yet unreported (see paragraph 125(d)(ii) at page 75 of the decision)], further orders that the respondent pay interest on the compensation for lost wages ordered by the Board. An employee who has been deprived of employment contrary to *The Labour Relations Act* suffers not only a loss of wages, but also a loss of the opportunity to use the money and have interest accrue on it. As this loss of interest is directly attributable to the employer's violation of the Act, it is appropriate that in its effort to make an employee whole, the Board direct the payment of interest on the wage loss. Compensation for loss of interest is also provided by the courts in Ontario. Section 38(3) of *The Judicature Act*, R.S.O. 1970, c. 228, as amended, S.O. 1977, c. 51 stipulates that "... a person who is entitled to a judgment for the payment of money is entitled to claim and have included in the judgment an award of interest thereon...". An award of interest ordered either by the courts or the Board is not compensation for general wrong done. Instead, in the words of Lord Denning, it is specific compensation "...for being kept out of money which ought to have been paid..." (*Jefford v. Gee*, [1970] 1 All E.R. 1202 at 1207).

29. In determining how to calculate the interest on the compensation award, the Board must take into account the fact that the total wage loss experienced by the employee does not occur all at once but rather accumulates with each pay period following the discharge. Another way to look at the process is to recognize that the employee's loss of accumulated interest is greater with respect to money that would have been earned immediately following the discharge than for money that would have been earned at the determination of

the complaint. If, for example, an employee had been wrongfully discharged six months prior to the Board's determination, the employee would be entitled to six months wages subject to the duty to mitigate. With respect to the first month, the employee was deprived of the use of one sixth of his total wage loss and the ability to earn interest on that money for five months. For the second month, the employee was deprived of another one sixth of his wage loss for a total of one third of his total loss and further deprived of the ability to earn interest on that sum for four months and so on. Perhaps the most simple way to describe the situation would be to say that in the first month the employee was deprived of one sixth of his total loss, in the second month, one third of his total loss, in the third month, one half of his total loss and so on. Because of the manner in which the loss accrues, it would be inappropriate to simply apply the relevant annual interest rate to the total amount of the loss.

30. The English Court of Appeal in *Jefford v. Gee*, *supra*, recognized this principle. Lord Denning expressed it in the following way at page 1207:

“Loss of wages. This occurred week by week. In principle, the interest should be calculated on each week's loss from that week to the date of trial. But that would mean too much detail. Alternatively, it would be possible to add up the loss every six months and allow interest on the total every six months until trial. . . . More rough and ready, the total loss could be taken from accident to trial: and interest allowed only on half of it, or half the time, or at half the rate.”

Focusing on the “rough and ready” methods suggested by Lord Denning, we note that the granting of interest on one half the amount of loss effectively takes into account the fact that the loss does not occur all at once, as discussed above, but rather rises steadily over the period away from work from zero to 100 per cent. The average amount of loss suffered by the complainant over the entire period, therefore, may be represented by half the amount found owing by the end of the period in question.

31. Having assessed the various modes of calculating interest suggested in *Jefford v. Gee*, we agree with Lord Denning that calculating interest based on each week's loss from the date of the discharge until the date of the Board's order, although most accurate, is too detailed to be workable. The method of calculation appropriate for this Board must be easily understood and readily administered. Laymen regularly appear before the Board either representing themselves or appearing as agents for complainants. The beneficial effect of the Board's interest award would diminish greatly if recipients had to seek legal advice to properly calculate the interest.

32. *The Judicature Act* has incorporated the second method of calculating interest suggested in *Jefford v. Gee*. Section 38(4) provides that interest “. . . shall be calculated on the balance of special damages incurred as totalled at the end of each six-month period following the notice in writing . . .”. The parameters of this method, however, are too broad to be effective for this Board. Being an administrative tribunal, the Board is able to process complaints with relative expediency. Totalling a claim at the end of six months and applying interest on that sum would not be well tailored to a compensation award which represents a four-month wage loss. We require a method that is adaptable to both long and short periods of time.

33. Considering all needs, the Board concludes that one of the rough and ready approaches highlighted in *Jefford v. Gee* is most suitable. For its ease of calculation, flexibility and basic accuracy, therefore, the Board has concluded that a calculation of interest on the Board's monetary awards should be carried out as follows: firstly, taking into account all factors, including the duty to mitigate, assess the wage portion of the compensation award; secondly, divide it in half; lastly, apply the appropriate annual interest rate pro-rated to reflect the proportion of the year represented by the compensation award.

34. Regarding the rate of interest to be applied, the Board, consistent with the general approach taken in section 38(3)(a) of *The Judicature Act*, has determined that the annual interest rate should be the prime rate as determined and published by the Bank of Canada in the *Bank of Canada Review* for the month in which the complaint was filed with the Board. This rate will be available upon request through the Board's offices and Labour Relations Officers.

35. For the purpose of clarity, we supply the following example. The Board determines that an employee has been wrongfully discharged. The Board's award marks four months from the time of discharge. Over that four-month period the total loss of wages, taking into account mitigation, is established to be \$3,000.00. The prime rate published in the *Bank of Canada Review* during the month the complaint was filed is 12 per cent. The interest would be calculated by dividing \$3,000.00 in half and applying the 12 per cent annual interest rate adjusted to a four-month period, that is, 12 per cent multiplied by 4/12ths. The resulting interest then is \$1,500.00 multiplied 12 per cent multiplied by 4/12th or \$60.00.

36. The Board remains seized of this matter in the event that a dispute arises over the implementation of this award.

1974-78-R Ontario Nurses' Association, Applicant, v. Kent-Chatham Board of Health, Respondent, v. Group of Employees, Objectors.

Certification – Employee – Administrator exercising control over non-bargaining unit employees – Member of management team – Excluded under section 1(3)(b)

BEFORE: Rory F. Egan, Vice-Chairman, and Board Members C. G. Bourne and H. Simon.

APPEARANCES: *Kathleen O'Neil and Elizabeth Woods for the applicant; Wallace M. Kenny and Donna Johnson for the respondent; no one for the objectors.*

DECISION OF THE BOARD; January 30, 1980

1. The Board certified the applicant pursuant to section 6(1a) of the Act. There remains to be decided the question as to whether the Home Care Administrator and the Family Planning Co-ordinator are to be included in the bargaining unit or excluded under the provisions of section 1(3)(b) of the Act.

2. The Board has heard the arguments of counsel for both parties with respect to the decision it ought to reach upon the evidence contained in the report of the officer appointed by the Board.
3. The home care operation was described by the witness as involving "coordination of active treatment, medical treatment services to patients in their own homes, either on a follow-up basis from the hospital or in lieu of being admitted to hospital care".
4. Marjorie Tench, the present incumbent of the classification of Administrator of the Home Care Program, has held the office for some five and one-half years. She is directly responsible to Dr. Brown, the Medical Officer of Health and to the Board of Health.
5. As Administrator of the Home Care Program provided by the respondent, Tench is responsible for its day-to-day monitoring. She admits and discharges patients to the program. She set up the program herself and promoted it with the Medical Association, head nurses, hospital boards and community agencies. She also arranged to use the services of those organizations and agencies.
6. The Administrator has a staff comprising physiotherapists and part-time speech therapists and occupational therapists. She buys other services from the existing community agencies like the Victorian Order of Nurses and the Red Cross Home Making Service. She also purchases drugs, dressings and lab work.
7. The Administrator also uses the services of what are termed "liaison nurses". These nurses were already employed in the Health Unit of the respondent organization when the Home Care Program was set up and remained on the staff of the Health Unit. This arrangement was brought about following a discussion of the question of setting up a separate liaison arrangement for the health care program. This discussion was between the Administrator, the Director and the Supervisor (presumably of nursing). The Administrator's evidence was that it was she who then decided that rather than having duplicate services, she would work in with the Health Unit liaison nurses and pay for the services but that she would have control over these as well.
8. As noted, the liaison nurses were already employed in the unit when the program commenced. The Administrator trained them to carry out the program. She discusses with the Director of Nursing and Supervisor at management meetings which of the staff nurses might be suitable for work in the program. The Administrator exercises a choice but the actual assignment to the unit is made by the nursing supervisor.
9. The control then exercised by the Administrator relates principally to methods to be used in carrying out the program. The liaison nurses are assigned to their various locations by the Administrator. The Administrator does not take part in the regular evaluation of nurses but the Administrator does discuss the matter with the supervisor of nurses.
10. Problems involving the actual patient care are discussed by the nurses and the Administrator and a consensus is sought. Problems such as time off are dealt with by the supervisor and not by the Administrator.
11. Management meetings are attended by the Director of Nursing, the supervisors

and the Administrator. At the meetings they discuss staff programming, problems with the staff, staffing situations and development programs and new programs. The Administrator also represents management at the Staff Education In-Service program. When the Director or supervisor is absent, the Administrator takes charge and has to be familiar with the operation and this is one of the reasons for her attendance at management meetings. Discipline problems are also discussed at these meetings.

12. The relationship of the Administrator with the occupational therapists, physiotherapists and speech therapists is on a different level from that of the nurses. The Administrator does the hiring of the former categories directly. She sets the wages using the going comparative rates as a guideline. She schedules the hours of work. She goes over the quality of their work with them and goes out periodically to see how they are working with the patients. The Administrator determines how many therapists are to be hired without consultation with anyone else. She assigns the work to the therapists and changes the assignments as she deems necessary.

13. The Administrator has a budget of \$32,000.00 out of which she pays for the services and supplies referred to above. She prepares and monitors the budget. After preparation by the Administrator, the budget is taken to the Medical Officer of Health who, as already observed, is the Administrator's direct superior. He looks it over and takes it to the Board of Health for approval. The money is supplied by the Ministry of Health.

14. The Ministry of Health has limited the budget increases, but the witness testified that additional funds can be obtained if the expense is justified. The Administrator produces a financial statement for the Ministry every month, a statistical statement and the financial status of the program. All decisions on the ordering of supplies are made by the Administrator. She allows no one to order supplies outside unless she authorizes them. The Administrator pays the Treasurer's office for paying the program's bills each month.

15. The Administrator testified that the budget "is a movable budget", so that if she overspends in one area, she can apply money that is not being used to that area. This decision is made by the Administrator. She deals directly with the Ministry of Health's Fiscal Branch. She described a transaction in which she obtained approval for an extra \$5,000.00 without going to anyone else.

16. It was argued by the union that the relationship between the Administrator and the nurses with whom she worked was one of collegiality and was analogous to the status of the departmental chairmen dealt with by the Board in the *Carleton University* case, [1975] OLRB Rep. June 500 where the departmental head was in effect found to be "*primus inter pares*". The union contended that policy decisions were made by the Administrator and nurses on a consultive or committee basis and that the Administrator was simply a leader among equals. The argument also was that in giving direction, the Administrator was only extending to the other nurses the benefit of her professional knowledge and experience.

17. It was further argued [again with reference to the *Carleton University* case, *supra*] that any authority she might exercise over members of the staff not covered by the bargaining unit would not cause a conflict of interest with respect to persons in the bargaining unit so extensive as to militate against her inclusion in the unit.

18. In the *Carleton University* case, *supra*, the Board, in dealing with models of managerial authority, was careful to point out that the university model is significantly different from the industrial model or with the hospital model to both of which reference is made in the award. The Board, in paragraph 19 of the *Carleton University* decision, *supra*, says:

“It is clear to us from the evidence that the effective initial decisions on hiring, promotion and tenure, curriculum, etc. are made by the faculty as a group. This, no doubt, reflects the fact that the university is seen, historically, as a community of scholars where common educational interests and goals – at least ideally – transcend the traditional management/non-management distinctions. In *Hamburger v. Cornell University*, 240 N.Y. 238, Mr. Justice Cardozo wrote:

‘A governing body of a University makes no attempt to control its professors and instructors as if they were servants. *By practice and tradition the members of the faculty are masters and not servants.* . . . *They have the independence appropriate to a company of scholars.*’ (underlining added)”

19. The Health Unit is not analogous to a community of scholars. While there are discussions and consultations on professional matters and mutual decisions are arrived at in that area, there is no committee approach to administration and budgetary or other managerial decisions. These lie entirely with the Administrator. It is also very clear that the authority exercised by the Administrator over the therapists is neither infrequent, minor nor sporadic.

20. As to the lack of conflict of interest as dealt with in the *Carleton University* case, the Board came to the conclusion that the degree of managerial authority exercised by the Chairman was so infrequent and represented such a minimal amount of his duties that it could not give rise to a conflict of interest within the unit. This conclusion, again, it should be emphasized, is reached having in mind the significantly different managerial scheme of a university. In the result and having regard to the whole of her responsibilities, the Board finds that the Home Care Administrator exercises managerial functions within the meaning of section 1(3)(b) of the Act and is consequently excluded from the bargaining unit.

21. The Board has carefully reviewed the evidence with respect to the duties of the Family Planning Co-ordinator in light of the submissions made by counsel. There can be no doubt that the position is one requiring the exercise of special professional knowledge and the ability to deal with public bodies, as well as private persons, in matters relating to family planning.

22. The incumbent is a public health nurse and is in charge of the program. She has limited budgetary responsibilities and some small discretion with respect to purchase of books and equipment. She reports to the Director of Nursing who, in turn, reports to the Medical Officer of Health. She does not attend management meetings and has no authority to hire nurses, although she may be consulted on the matter. She uses public health nurses in the program as group leaders. These nurses also set up programs in small communities but none have the same overall responsibility as the Co-ordinator.

23. On the evidence, the Board finds, as indicated earlier, that the Family Planning Co-ordinator carries out a program of importance to the Health Unit, but the burden of the job rests in the exercise of her professional knowledge and communication skills rather than in any managerial activities. We accordingly find that the Family Planning Co-ordinator does not exercise managerial functions nor is she employed in a confidential capacity within the meaning of the Act and is consequently included in the bargaining unit.

24. The composition of the bargaining unit is thus finally resolved. The Board accordingly finds that all registered and graduate nurses employed by the respondent save and except Supervisors – Public Health Nurse, persons above the rank of Supervisor – Public Health Nurse, the Administrator – Home Care Program, and persons regularly employed for not more than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

25. A formal certificate will now issue to the applicant.

0864-79-U Stanley Dixon, Complainant, v. International Union United Automobile, Aerospace and Agricultural Implement Workers of America and its Local Union 439, Respondent, v. Massey-Ferguson Industries Limited, Intervener.

Duty of Fair Representation – Grievor seeking reinstatement of lost seniority – Company agreeing with grievor’s claim – Union not allowing seniority reinstatement – Other members of unit adversely affected by reinstatement – No violation of section 60

BEFORE: Pamela C. Picher, Vice-Chairman

APPEARANCES: *Stanley Dixon and Allan Millard for the complainant; Len MacLean, Jim Porter and Lloyd Jacques for the respondent; C. G. Riggs and J. R. Rohrer for the intervener.*

DECISION OF THE BOARD; January 11, 1980

1. Mr. Stanley Dixon has filed a complaint under section 79 of the Act alleging that he has been dealt with by the respondent union, hereinafter referred to as the U.A.W., contrary to the provisions of section 60 of *The Labour Relations Act* which read as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

Counsel for the complainant contends that the U.A.W. acted in an arbitrary manner through its consistent failure to comprehend Dixon’s complaint. Although counsel agrees

that Dixon did not ask the union to file a grievance, he asserts that in keeping with its duty of fair representation the union should have recognized that in Dixon's situation a grievance should have been filed. Additionally, counsel alleges that the union further acted in an arbitrary manner by later failing to turn its mind to the merits of Dixon's particular circumstances when the union declined to accept management's offer to give Dixon the full plant-wide and skilled trades seniority he was seeking.

2. With intermittent lay-offs Dixon has been employed by Massey-Ferguson since 1957. It was his recall from lay-off on November 2, 1971 which touched off the events forming the substance of this complaint. While the parties agree that Dixon did not accept the recall offer, there is considerable dispute as to whether or not he, at the same time, voluntarily terminated his employment.

3. Paragraph 15.13 of Article XV of the collective agreement states that recall to work will be by registered written notice or telegram. It is common ground that Dixon's recall notice was over the telephone rather than in writing. Paragraph 11.04 of Article XI provides, among other things, that an employee's seniority rights will be terminated if he fails to return to work within 8 calendar days from the date of his recall notice or if he quits. Dixon alleges that he returned to the plant within the 8 days and, as stated above, disputes that he quit.

4. Paragraph 11.04 of the collective agreement further stipulates that if an employee refuses to be recalled for temporary work of 30 days or less he will not lose his seniority rights. Dixon testified that when Mr. Lorne Daley, his general foreman, recalled him on Tuesday, November 2, 1971, he asked Daley if he would be offered 30 days' guaranteed work. He claims that when Daley told him he could not provide the guarantee, he declined the recall offer. He strongly denies the suggestion that he quit his employment at that time and asserts that he only refused the particular recall offer. Dixon's evidence is that when he learned a day or two later that the company considered that he had quit his employment, he returned to the plant to clear up the situation. He states that when he spoke with Brian King, Chairman of the Skilled Trades Committee, on Friday, November 4, 1971, King said that he would see what he could do about the company's conclusion that he had quit his employment and told Dixon not to worry. While acknowledging that he did not ask the union to file a grievance, he stated that he expected that the union would. He agreed, however, that he never inquired whether the union had in fact filed a grievance or talked to the company directly to dispute its conclusion that he had quit his employment.

5. The union's version of the events of the first week in November, 1971 directly contradicts Dixon's testimony. King testified that Dixon came into the plant on Tuesday, November 2 asking King's opinion of how long the job for which he was being recalled might last. King testified that he advised Dixon to ask Daley for a guarantee of 30 days' work pursuant to the collective agreement so that he could remain on the recall list if he decided to decline this particular recall offer. Dixon, who was then employed as an auto mechanic at Delco in Scarborough, told King that he would go back to Delco to see how permanent that job was and would then be back in touch. King testified that Dixon phoned him the next day and stated that his foreman at Delco told him that as he was the only auto mechanic on his shift it appeared that he would not be subject to lay-off. King's evidence was that he emphasized to Dixon that no matter how secure things appeared to be at Delco, he should take the precaution of asking for the 30-day guarantee from Massey-Ferguson. King's evidence is

that Dixon replied that he didn't see any point in playing games, emphasizing the security of his job at Delco and expressing doubt about how much longer Massey-Ferguson's Toronto plant would be in operation in any event. According to King, Dixon phoned him a day or two later to ask questions concerning his entitlement to separation pay and pension benefits. King stated that it was apparent to him from the nature of the conversation that Dixon had terminated his employment.

6. Sometime during the following week, the second week of November, Dixon told King that he either had been or was being laid off by Delco and asked him what he could do about it. King testified that he informed Dixon that the next mechanic on the skilled trades seniority list had been recalled and that in view of the fact that Dixon had quit his job there was really nothing that could be done. King strongly denies that he said anything to Dixon to allay his concerns. King testified that while he was sympathetic, he made it plain to Dixon that since he had quit his job and had not asked for the 30-day guarantee there was nothing that could be done. The next time King saw Dixon was over a year later when he had been rehired by Massey-Ferguson as a new employee.

7. Mr. William Silk, the steward in the Skilled Trades Department, testified as to conversations he had with Dixon immediately following Dixon's recall in November, 1971. Silk stated that Dixon spoke with him the morning he received his recall notice saying that he was quitting his job because Massey-Ferguson was folding up and could not provide steady employment. He stated that his boss at Delco had confirmed that he had a steady job at Delco and that since he was making 10 to 15 cents an hour more there he was not going to come back to Massey-Ferguson. Silk testified that he advised Dixon to ask for the 30-day guarantee or at least take 8 days to think it over before telling the company. According to Silk, Dixon replied that he was not going to play around with it anymore and asked why he should take time when he could get things cleared up all at once. Silk testified that the following week Dixon told him that he had "blown it". According to Silk, Dixon was extremely upset because contrary to his expectations he had been laid-off from Delco. He said he had quit his job at Massey-Ferguson on the confirmation from his boss at Delco that he had a steady job and asked Silk what he could do now. Silk testified that he told Dixon there was not much he could do for him and sent him to see Brian King.

8. Dixon was re-employed by Massey-Ferguson on November 28, 1972, approximately one year later. It is common ground that he returned as a new employee with no seniority. Dixon claims that following his re-employment he continually pressured King, Silk, James Austin who is the chairman of the Plant Committee for the Toronto Works and James Porter who is the president of the Local about his loss of seniority. He said that they repeatedly told him they were working on the matter and that in 1974 Porter told him they would wait for the next round of negotiations to see if they could work out an agreement with the company to backdate both his plant-wide and skilled trades seniority. It is agreed that his circumstances were not made the subject of negotiations. Dixon's evidence is that when he realized he would be given no help from the union he decided to approach the company directly with his problems. Three or four weeks later the company issued the following seniority offer to Dixon:

"June 10, 1977.

Stanley Dixon, 52335,

25 Mitcham Drive,

Toronto, Ontario.

Dear Mr. Dixon:

This is written in response to the request which you recently made to your foreman concerning your seniority standing. Your seniority date with Massey-Ferguson Industries Limited will be changed from November 28, 1972 to November 16, 1958, to reflect the time you worked during the period October 28, 1957 to November 1971. This change will be effective June 13, 1977 for all purposes pursuant to the Master Agreement provided that you meet the following conditions;

- 1) In respect of your seniority date at Massey-Ferguson, you will at no time in the future initiate another claim concerning the incidents of the period of November 9, 1971, to November 28, 1972.
- 2) The November 16, 1958 seniority date will be effective on June 13, 1977. After that date you will be entitled to all benefits accruing to the November 16, 1958 seniority date but there will be no retroactive benefit entitlement.

I trust this meets with your understanding and if you agree to these conditions please sign and return two copies of this letter to me.

GTN:00

Signed

S. Dixon, 52335

Your very truly,

G. T. Neil,

Labour Relations

Administrator - Toronto

Union

Committeeman"

As evidenced in the letter the company offered to backdate Dixon's plant-wide and skilled trades seniority to November 16, 1958. The outstanding question was whether the union would accede to the offer.

9. One again Dixon's version of events is contradicted almost entirely by witnesses who testified on behalf of the union. King contends that between the time of his brief encounter with Dixon upon being rehired in 1972 and his transfer back into the Maintenance Department as an oiler in 1974 he had no conversations with Dixon and certainly did not take part in continual discussions relating to his seniority. Following Dixon's transfer back into the Maintenance Department, King confirmed that Dixon asked him about his chances of getting his seniority back. King stated, however, that he told Dixon he didn't see how he could acquire his previous skilled trades seniority. He explained that numerous people had lost their skilled trades seniority in the past and that a change in the situation for one person would lead to inequities for many.

10. According to King, the next time Dixon's case was discussed was in early 1977.

five and a half years after the recall in question, when at Dixon's instigation Austin, King and Dixon met to discuss Dixon's seniority. Austin and King both testified that at the meeting Dixon said that the problem of his seniority should be brought up at negotiations because everything had happened so fast at the time of his 1971 recall and he had in fact been back to the plant within 8 days. King stated that it was at this meeting that Dixon first mentioned the fact that he had come back to the plant within the 8-day period referred to in 11.04(e) of the collective agreement. King told him that he would put his case before the Bargaining Committee for consideration but emphasized to the Board that he did not give Dixon any reason to believe that the Committee's response would be positive. He informed him of his view that the eight day provision in the collective agreement could not assist an individual who had voluntarily terminated his employment. King testified that Dixon did not dispute their expressed premise that in 1971 he had quit his employment and did not at that time complain about his treatment from any member of the union or complain that no grievance had been filed on his own behalf. King testified that before the Bargaining Committee could discuss the matter, the company made the seniority proposal set out above.

11. In view of the company's seniority offer, the union called a special meeting of the Toronto Bargaining Committee to decide whether or not they would consent to the proposal. King testified that he got photocopies of Mr. Dixon's employment record for each member and that he tried to present Dixon's case impartially by giving the facts without giving his opinion that the offer should not be accepted. He said that he answered some questions, kept his own comments to a minimum and made no recommendation. The Committee, after some discussion, decided that if the company wanted to backdate Dixon's seniority they would not stand in the way.

12. Dixon's elation at the news that the union had accepted the company's offer was brief however. Immediately following the Bargaining Committee's decision, King was phoned at home by the two employees who, prior to Dixon's recall, had been below Dixon on the Skilled Trades seniority list but jumped above him when he failed to return to work in November, 1971. The two employees complained to King that the impact of the Bargaining Committee's decision was that they would lose their places on the skilled trades seniority list. The two employees argued that the Committee had no right to reinstate Dixon's seniority and threatened to engage counsel and appeal the matter if the decision was not reversed. The evidence establishes that Porter also received phone calls from the same two employees threatening to go to the membership and, if necessary, the Labour Relations Board if the decision was not reversed.

13. In the face of this backlash the Bargaining Committee reconvened two days later. King testified that he was criticized at the second meeting for not having expressed his opinion when he was the one who was in fact aware of all the circumstances. The members complained that they hadn't understood that Dixon had been out of the plant for two years and they hadn't recognized that an acceptance of the company's offer would cause Dixon to jump two employees on the seniority list. The Bargaining Committee thereupon reversed its decision and produced a counterproposal. Under the union's proposal Dixon's plant-wide seniority would be backdated as suggested by the company, thus increasing his benefits, but his skilled trades seniority would be left untouched, thus eliminating the concern of the other employees. Porter testified that in reversing their decision the members of the Bargaining Committee considered: 1. that Dixon had been told at the time of the recall that he should invoke the 30-day clause; 2. that he had quit his employment; 3. that it was unfair to

put Dixon ahead of the other two employees; and 4. that it would be inequitable for other people who over the years had lost their skilled trades seniority.

14. Dixon testified that when he phoned Porter, the President of the Local, to find out what was going on, Porter said, "To tell you the truth, the Bargaining Committee voted against you because you shouldn't have approached the company". The Board accepts Porter's denial that he ever told Dixon that the reason the Bargaining Committee reversed its decision was because he shouldn't have approached the company. Both he and King further stated that no one at the Bargaining Committee meeting expressed any personal animosity towards Dixon. Dixon further testified that when Porter presented him with the document containing the revised proposal, he was extremely upset and refused to sign it until Porter told him that if he didn't accept this proposal he might not be able to get anything. Dixon contends that Porter's comment was a threat and that he signed under duress. He agrees, however, that he read and understood the document completely before signing. We note that the circumstances surrounding the signing of this document were not relied on by the complainant's counsel as forming part of the complaint. Furthermore, in the Board's assessment, the evidence could not support a finding that Porter threatened Dixon or that Dixon signed unwillingly.

15. Sometime in 1978 Dixon told Porter that he had read an article explaining the public review system of the U.A.W. and wanted to follow that procedure to appeal his case. Porter suggested that Dixon should first present his case to the membership to see if he had their support. At a membership meeting convened on April 13, 1978, Dixon presented his case. Porter agreed that Dixon received some heckling and that he had to call the meeting to order on two occasions. King, also present at the meeting, agreed that Dixon received some heckling but insisted that he was given ample opportunity to present his case. King stated that in relating his facts Dixon was completely silent on the issue of whether or not he had quit his employment and emphasized that he had never received a telegram informing him of his recall pursuant to the terms of the collective agreement. King testified that while several members spoke in opposition to Dixon's plea, others spoke in his favour. The majority, however, did not agree that his skilled trades seniority should be backdated and a vote was taken by the membership supporting the Bargaining Committee's decision.

16. To fulfill the duty of fair representation imposed by section 60 of *The Labour Relations Act* a union is precluded from treating an employee in the bargaining unit in an arbitrary manner. The Board has consistently found that a union must address its mind to the facts of the employee's case and act on available evidence. It is further recognized that a union must be concerned about the well being of the membership as a whole and should not elevate the interests of one member to the detriment of the whole. Thus, for instance, while an individual with a grievance which has not been taken to arbitration by the union may feel that the merits of his case have not been properly recognized, it would not be a violation of the union's duty of fair representation if, in making its decision, the union had evaluated the facts of the case, acted on available evidence and was motivated by the interests of the membership as a whole.

17. Counsel for the complainant in this case alleges that the union treated Dixon in an arbitrary manner by continually failing to understand the facts of his case and by ignoring his circumstances when the Bargaining Committee reversed its initial acceptance of the company's offer to reinstate both his skilled trades and plant wide seniority. Counsel does not allege that Dixon was discriminated against or that the union acted in bad faith.

18. The Board is readily satisfied that the union officials involved in this case concluded on reasonable and compelling grounds in November 1971 that Dixon had voluntarily terminated his own employment. Dixon's counsel conceded that there was no evidence whatsoever to contradict the union's consistent evidence that Dixon had never disputed the union's conclusion, openly expressed, that Dixon had quit his employment in November 1971. On each occasion when Dixon approached someone from the union about his circumstances, whether it was immediately after he declined his recall in 1971 or after he returned to the Maintenance Department in 1974 or in 1977 when he met King and Austin, the Board concludes that the evidence unquestionably demonstrates that the union officials listened fully to his complaint. The Board accepts that from the outset the union told Dixon that because of the unaltered fact that he had voluntarily terminated his own employment there was little they could do for him. When Mr. King testified that he didn't really understand Dixon's claim, first expressed in 1974, that he should get his seniority back because he had returned to the plant within 8 days of his recall, it is patently clear on the evidence as a whole that King was expressing his view that the provisions of the collective agreement relating to the return to the plant within 8 days of recall could not assist Dixon because of the undisputed fact that he had quit his employment. The statement does not support an inference that King acted without understanding some aspect of Dixon's case. Far from acting in an arbitrary manner, the Board is satisfied that every time Dixon raised his complaint with the union, the union listened to him and patiently tried to make him understand that they could do little to assist him. In the Board's view the complainant has confused the union's failure to agree with his complaint with a failure to understand his complaint.

19. Turning to the Bargaining Committee's decision in June, 1977 to reverse their decision to accept the company's offer to backdate Dixon's plant-wide and skilled trades seniority, the Board sympathizes with the let down and anger Dixon must have experienced upon learning of the Committee's change of heart. Clearly it would have been better for all concerned if King, who had been familiar with the case from its outset six years before, had expressed his view at the first Bargaining Committee meeting that the union should not accept the company's proposal. There is absolutely no evidence to conclude, however, that the Bargaining Committee acted in an arbitrary fashion in reversing its original decision. Far from considering the circumstances of the other two employees to the exclusion of Mr. Dixon, as alleged by the counsel for the complainant, the union evaluated the circumstances of the other two employees in light of Dixon's situation and concluded that it would have been unfair to allow Dixon to take advantage of a windfall offer from the company which would prejudice the other two employees by moving them down on the seniority list.

20. In making both decisions the Bargaining Committee addressed its mind to Dixon's circumstances: the first time, in making a decision favourable to Dixon, they viewed Dixon's case in isolation; the second time, in reversing themselves, they weighed Dixon's rights with those of other bargaining unit employees. In exercising its duty of fair representation, the union must keep in mind the respective concerns of all members of the bargaining unit and cannot focus on the interests of one member to the exclusion of the others. The Bargaining Committee's initial, positive response to the company's offer was a decision that the union, upon reflection, viewed as one that would have promoted the interests of a single employee to the unfair detriment of both the two employees who would have immediately dropped down on the skilled trades seniority list as well as others members who had also quit at one time or another, lost their seniority and had not, subsequently, been given preferential treatment. The Board readily accepts that the union was concerned that if they allowed

their original decision to stand they might well have been violating their duty of fair representation in respect of other individuals in the bargaining unit.

21. The Board concludes that in dealing with Mr. Dixon's complaint over the period from 1971 through 1978 the union continually addressed its mind to the merits of Dixon's concern and always acted on available evidence. A clear example of the union's desire to help Mr. Dixon was that almost a year after the matter apparently had been solved through the signing of the final agreement to backdate Mr. Dixon's plant-wide seniority, Porter invited Dixon to speak before the Membership Committee when Dixon indicated that he still felt aggrieved. On reviewing the circumstances of this matter the Board concludes that Dixon for many years now has been trying to undo the ill-advised action he took by telling the company, in haste, that he was quitting his employment rather than taking the route suggested by the union officials to protect his place on the recall list by requesting a 30-day guarantee.

22. For the reasons given above the Board finds that the union has represented Dixon in accordance with its duty under section 60 of *The Labour Relations Act* and has not acted in an arbitrary manner. Accordingly, the complaint is dismissed.

1480-79-R United Electrical, Radio and Machine Workers of America (UE), Applicant, v. **Milltronics Limited**, Respondent, v. The Employees' Association of Milltronics Limited, Intervener.

Bargaining Unit – Certification – Timeliness – Single collective agreement covering plant and office units – Whether raiding union must organize in both units – Conciliation officer appointed prior to “open” period – Whether certification application untimely

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members F.W. Murray and B.K. Lee

APPEARANCES: *Arthur E. Jenkyn and William Woodbeck for the applicant; Michael Gordon and others for the respondent; Michael G. Horan and Keith Bechervaise for the intervenor.*

DECISION OF THE BOARD; January 10, 1980

I

1. This is an application for certification.

2. The applicant, United Electrical, Radio and Machine Workers of America (“UE”) seeks to displace The Employees' Association of Milltronics Limited (“the Association”) as the bargaining agent for certain employees of Milltronics Limited. By a decision dated November 26th, 1979 the Board determined that the applicant was a trade union and had made a timely application for certification. The Board further determined the unit ap-

appropriate for collective bargaining and also that the applicant represented more than fifty-five per cent of the employees in that unit. In accordance with its usual practice, and pursuant to section 7(2) of *The Labour Relations Act*, the Board ordered a representation vote so that the employees in the unit could choose whether they wished to be represented by the UE or the Association in their collective bargaining relationship with the respondent. Because time is of the essence in certification applications – especially where, as here, one union was seeking to displace another – the Board considered it appropriate to issue its conclusions of fact and law and to set out our reasons therefor more fully at a later date. These reasons are set out hereunder.

3. On June 23rd, 1977 the Association applied for certification as the bargaining agent for *all employees* of the respondent company at its location in Peterborough. The “all employee” unit which the applicant sought included both plant and office employees. By a decision dated July 28th, 1977 the Board rejected the proposed bargaining unit and determined that the appropriate bargaining structure should consist of two separate bargaining units: one for office and clerical employees; and one for plant employees. A separate certificate was issued for each of these units.

4. In June of 1978 the company and the Association entered into a collective agreement. The recognition clause of that agreement provides as follows:

“RECOGNITION

2.1 The Company recognizes the Association as the exclusive representative for the purpose of collective bargaining for all employees of Milltronics at Peterborough, Ontario, save and except supervisors, persons above the rank of supervisors, office and clerical employees, salesmen, professional engineers and product specialists (hereinafter referred to as bargaining unit #1)

2.2 The Company further recognizes the Association as the exclusive representative for the purpose of collective bargaining for all office and clerical employees of Milltronics at Peterborough save and except supervisors, persons above the rank of supervisors, accounting staff, salesmen, professional engineers and product specialists (hereinafter referred to as bargaining unit #2)”

The language of the recognition clause is identical to that used by the Board in paragraphs 3 and 4 of its July 1977 decision. By adopting this language the parties preserved the separate identity of the two bargaining units. The language in the remainder of the collective agreement is consistent with this position.

5. In the present application the UE is seeking bargaining rights for the employees in the “plant unit.” The UE argues that it is entitled to displace the Association in either bargaining unit especially where, as here, the parties have maintained the separate identity of the two units in their collective agreement. The UE also relies upon the earlier decision of the Board which found that the unit which it now seeks is appropriate. The Association and the employer both contend that the appropriate bargaining unit is a “composite unit” which includes both plant and office employees. It is argued that the UE must seek bargaining

rights for (and establish its majority support in) this composite unit. It will be observed that this is the very unit which the Association previously sought, and which the Board previously found, to be inappropriate.

6. On an application for certification the Board is required to determine the unit of employees which is appropriate for collective bargaining. Where one trade union is seeking to displace another, however, the established bargaining structure is *prima facie* appropriate – particularly if it has been established by the parties themselves, through collective bargaining, and continued through the years over several collective agreements. Indeed, what better evidence of “appropriateness” could there be than a pre-existing bargaining structure which the parties have developed themselves and have adapted to their own bargaining circumstances. The Board has been reluctant to fragment an established bargaining structure or to “carve out” groups of employees from such structure. The Board will generally find the appropriate bargaining unit to be that which the incumbent presently represents; although, of course, in appropriate circumstances, a larger unit may also be appropriate and could be granted without raising any concern about fragmentation. Usually, however, a “raiding union” must “take” what the incumbent union has. Here the Board has certified two separate units and the parties have maintained their separate identity in their collective agreement. We are fully satisfied that the “plant unit” standing by itself, is a unit of employees appropriate for collective bargaining. This is not a case in which the Board has made a determination of appropriateness and the parties have afterwards, through a series of negotiations, created a new collective bargaining regime. If such were the case the Board might very well give such subsequent bargaining practice more weight than our original determination of appropriateness made on the initial application for certification. In the circumstances of this case, however, it is clear that the parties have carried forward, into their collective agreement, the two bargaining units which the Board previously found to be appropriate. We are satisfied, therefore, pursuant to section 6 of *The Labour Relations Act*, that the “plant” unit is a unit of employees appropriate for collective bargaining and that the UE is entitled to seek certification for the employees in that unit.

7. Having regard to the foregoing, the Board confirms its finding that the unit of employees appropriate for collective bargaining is as follows: all employees of the respondent at Peterborough, save and except supervisors, persons above the rank of supervisor, office and clerical employees, salesmen, professional engineers and product specialists.

8. For the purpose of clarity the Board notes the agreement of the parties that field service staff and accounting staff are excluded from this unit.

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II

10. The respondent and the intervener both contended that the application was untimely and that, despite the applicant’s support among the employees in the bargaining unit, no representation vote could be ordered. The facts in support of this contention are not in dispute. The current collective agreement between the parties provides as follows:

“DURATION

3.1 This agreement shall become effective on the 1st day of June 1978 and remain in full force and effect until the 31st day of Dec. 1979 and thereafter from year to year, unless within (60) sixty days prior to the date of expiration in any year, either party gives notice in writing of desired changes in, or termination of, this Agreement. Every effort will be made to meet within (30) thirty days of the date on which this notice is received, for the purpose of commencing negotiations."

On or about October 2nd, 1979 the respondent purported to send to the Association a notice to bargain with a view to concluding a new collective agreement. On October 25th, 1979 the employer requested the appointment of a Conciliation Officer, pursuant to section 15 of *The Labour Relations Act*. On 1st November, 1979 (i.e., during the last two months of the nominal term of the collective agreement, commonly called the "open period") the UE made its application for certification. It will be observed that the purported notice to bargain was not given within the time limit specified in Article 3.1, although it would appear that both parties treated it as a valid notice to bargain and engaged in negotiations. In any event, the notice to bargain was given within the time specified by section 45 of the Act, and both parties treated December 31, 1979 as the expiry date of the collective agreement. The respondent and the intervener contend that the application for certification is untimely by reason of section 53(2) of the Act. The statutory provisions relative to our determination are as follows:

"5(4) Where a collective agreement is for a term of not more than three years, a trade union may, subject to section 53, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit defined in the agreement only after the commencement of the last two months of its operation.

53(2) Where notice has been given under section 45 and the Minister has appointed a conciliation officer or a mediator, no application for certification of a bargaining agent of any of the employees in the bargaining units as defined in the collective agreement and no application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit as defined in the agreement shall be made after the date when the agreement ceased to operate or the date when the Minister appointed a conciliation officer or a mediator, whichever is later, unless following the appointment of a conciliation officer or a mediator, if no collective agreement has been made,

- (a) at least twelve months have elapsed from the date of the appointment of the conciliation officer or a mediator; or
- (b) a conciliation board or a mediator has been appointed and thirty days have elapsed after the report of the conciliation board or the mediator has been released by the Minister to the parties; or
- (c) thirty days have elapsed after the Minister has informed the parties that he does not consider it desirable to appoint a conciliation board,

whichever is later.

44(1) If a collective agreement does not provide for its term of operation or provides for its operation for an unspecified term or for a term of less than one year, it shall be deemed to provide for its operation for a term of one year from the date that it commenced to operate.

(2) Notwithstanding subsection 1, the parties may, in a collective agreement or otherwise and before or after the collective agreement has ceased to operate, agree to continue the operation of the collective agreement or any of its provisions for a period of less than one year while they are bargaining for its renewal with or without modifications or for a new agreement, but such continued operation does not bar an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit and the continuation of the collective agreement may be terminated by either party upon thirty days notice to the other party.

(3) A collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or this Act without the consent of the Board on the joint application of the parties.

(4) Notwithstanding anything in this section, where an employer joins an employer's organization that is a party to a collective agreement with a trade union or council of trade unions and he agrees with the trade union or council of trade unions to be bound by the collective agreement between the trade union or council of trade unions and the employers' organization, the agreement ceases to be binding upon the employer and the trade union or council of trade unions at the same time as the agreement between the employers' organization and the trade union or council of trade unions ceases to be binding."

11. *The Labour Relations Act* provides for collective bargaining between employers and trade unions as the *freely designated* representatives of the employees. Ultimately, the trade union's position as bargaining agent rests upon the support of the majority of the employees in the bargaining unit. The most common way in which a trade union can demonstrate that it represents the majority of employees is by an application for certification. Similarly, if a trade union loses the support of a majority of the employees its bargaining rights can be terminated upon application to the Labour Relations Board under section 49 of the Act.

12. Where there is no existing collective bargaining relationship a trade union may apply for certification at any time; however, where there is an established bargaining relationship the Legislature has recognized the need to balance the right of employees to be represented by a bargaining agent of their own choice and the right of employers and incumbent trade unions to a reasonable degree of stability. Accordingly, the Act provides certain restrictions upon when employees can terminate their union's bargaining rights, or replace their existing union with another one. The time limit relevant to this case is established by section 5(4) of the Act (see above) and is calculated with reference to the term of the collec-

tive agreement. An application to displace the Association can only be made after the commencement of the last two months of the agreements's operation. As we have already mentioned, this period of time is commonly referred to as the "open period" and denotes the time during which certification applications can be made by competing trade unions.

13. Because the timeliness of certification and termination applications is calculated with reference to the open period of the collective agreement, that agreement must have a specified term. There must be a fixed, and readily ascertainable, termination date so that dissatisfied employees will know when a certification or termination application can be made, and a "raiding union" will know when to commence its organizing campaign. The requirement for a specified term of operation is provided in section 44(1) of the Act, and the Board has generally held that since the rights of employees and third party unions may be affected, the term of operation must be clear and explicit on the face of the document constituting the collective agreement. Indeed, it is because of these third party interests that section 44(3) of the Act prohibits the primary contracting parties from terminating their agreement before it ceases to operate in accordance with its terms, without the express consent of the Labour Relations Board. This statutory provision preventing the parties from altering the term of their agreement would appear curious if one were unaware that important third party interests and statutory rights are directly related to, or contingent upon, the duration of the agreement.

14. Section 53(2) adds another qualification to the right of employees to repudiate, or change, their bargaining agent. The appointment of a Conciliation Officer may, in some circumstances, preclude, or delay, an application for certification or termination. However, the appointment of a Conciliation Officer cannot prevent such application during the "open period." The language used by the Legislature is not a model of clarity, but can easily be expressed metaphorically: the door opens with the beginning of the open period and remains open until either a new collective agreement is concluded or a Conciliation Officer is appointed – but neither a collective agreement nor the appointment of a Conciliation Officer can close the door before the expiry of the open period. The employees are given two clear months in which to reject their existing bargaining agent and neither their employer nor their bargaining agent can abridge that opportunity. The open period may remain "open" longer than two months if no Conciliation Officer is appointed or if no collective agreement is concluded; however, the employees are guaranteed at least two months to make their applications to the Board, should they wish to do so. If the section were interpreted otherwise, it would be possible for the incumbent union and the employer to unilaterally restrict the employees' right to be represented by a bargaining agent of their own choosing. The facts presently before us provide a case in point. Here, the Conciliation Officer was appointed *prior* to the beginning of the open period and, if the respondent's argument is to be accepted, this appointment postpones the employee's right to change bargaining agents for at least a year and, further, if a collective agreement is concluded, it will be postponed altogether until the open period of *that* collective agreement. If the argument of the respondent and intervener is accepted it would be possible to postpone indefinitely the employees' right to change bargaining agents. In our view this contention is not only unsupportable on the language of the statute, but also unreasonable, and inconsistent with the scheme of the Act and the evident intention of the Legislature. Accordingly, having regard to 5(4) and section 53(2) of *The Labour Relations Act*, and the fact that this application was made during the "open period" of the collective agreement between the respondent and the intervener, we are satisfied that the application is timely.

15. In accordance with the decision of the Board dated November 26th, 1979, a vote was taken on December 17th, 1979, in which the employees in the bargaining unit were asked to choose whether they wished the UE or the Association to represent them. The representation vote was supervised by an officer of the Labour Relations Board and interested parties were entitled to have scrutineers present. On the basis of the ballots cast, the majority of those employees voting indicated that they wished to be represented by the UE. Notice of the report of the Returning Officer, in Form 43, was served upon the parties; but no objection to the vote has been filed, nor has there been any indication of a desire to make representations. The Board therefore certifies the United Electrical, Radio and Machine Workers of America (UE) to be the bargaining agent for the employees of the respondent in the above described bargaining unit. Pursuant to section 48 of *The Labour Relations Act*, the bargaining rights of The Employees' Association of Milltronics Limited are terminated in so far as they affect those employees.

16. A certificate in the usual form will issue to the applicant.

1437-78-R Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 2482, 3227, 1747 and 3233, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **The Municipality of Metropolitan Toronto**, Respondent, v. Toronto Civic Employees Union Local 43, C.U.P.E., Intervener.

Certification – Construction Industry – Municipality employing carpenters to perform construction work – Municipality operating business in construction industry

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and D. B. Archer.

APPEARANCES: *Harold F. Caley and others for the applicant; H. W. O. Doyle, A. H. Cohen and P. L. Schmidt for the respondent; C. M. Mitchell and others for the intervener.*

DECISION OF THE BOARD; January 15, 1980

1. On November 23, 1978, the applicant applied for certification with respect to a bargaining unit of all carpenters and carpenters' apprentices in the employ of the respondent working in the Board's geographic area #8.

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5. In its reply the respondent modified the applicant's proposed bargaining unit by proposing the exclusion of foreman and persons above the rank of foreman and by restricting the proposed bargaining unit to the Municipality of Metropolitan Toronto. In addition the respondent stated in paragraph 14(3) of its reply:

"The Respondent, The Municipality of Metropolitan Toronto, is not

an “employer” within the meaning of clause (c) of section 106 of The Labour Relations Act and therefore, the Board has no jurisdiction to grant the application for certification. The Respondent will rely on the provisions of The Municipality of Metropolitan Toronto Act, The Municipal Act and other relevant statutes respecting the nature of the function of the Respondent.

The Respondent asks that this application be dismissed.”

6. In its intervention it was the position of the intervener that the respondent is not an employer within the meaning of section 106 of the Act and that the application was not properly brought under the construction industry provisions of the Act. It was also the position of the intervener that it has bargaining rights for carpenters pursuant to a collective agreement with the respondent.

7. There was no dispute that the respondent and the intervener were bound by a collective agreement made between them on July 14, 1978. The Collective agreement contains the following provisions:

“Article 2
RECOGNITION

2.01 The Metropolitan Corporation recognizes Local 43 as the sole bargaining agent for collective bargaining purposes for all employees from time to time who are engaged in work outside the administrative offices of the Metropolitan Corporation and who occupy the positions set out in Schedule 1 hereto annexed and forming part of this agreement, such unit of employees being hereinafter referred to as “the 43 Unit”.

Article 32
CRAFT TRADESMEN

32.01 This agreement shall not apply to employees in the “Temporary Service” who are hired from time to time by the Metropolitan Corporation through a craft trade union for specific work.”

Article 7 provides that the wages to be paid to all employees in the 43 Unit shall be in accordance with the rate of pay for each position as set out in Schedule 1. In Schedule 1 the following entry appears:

Position Code and Title	“Hours Bi-Weekly	Step	Annual	Bi-Weekly	Hourly
... 102 Carpenter ...	80	00	17,226	660.00	8.25”

8. It was also agreed that the respondent’s employees who are arguably affected by this application are two permanent employees and ten temporary employees. After hearing

the arguments of the parties, the Board ruled at the hearing that the intervener had status to intervene in this proceeding on the grounds that the application referred to a bargaining unit of carpenters without qualification and because the collective agreement between the respondent and the intervener on its face covered carpenters subject to certain possible qualifications.

9. At the commencement of the hearings the respondent adopted the position that it is not an employer within the meaning of section 106(c) of the Act. In addition, the respondent also adopted the position that the employees who are affected by this application did not perform construction work, and, in the alternative, if these employees did perform any construction work such work was of such a marginal nature in relation to the respondent so as not to warrant certification.

10. The Board heard evidence with respect to the nature of the work performed by the employees who are affected by this application and also with respect to the totality of the respondent's structure and operations.

11. There were ten temporary carpenters who are arguably affected by this application. They are as follows: Nathan M. Brown, Nelson H. Bowness, Santi Luigi Cilia, Robert Jenkins, Bertram Woods, George Barker, John Duffy, Harvey Mercer, N. Haye and Antonio Tatone. The two permanent carpenters who are employees of the respondent are W. C. Moore and J. J. Rakovsky.

12. The temporary carpenters were employed by the respondent for periods which varied from two months to continuous employment since the respondent was formed in 1953. Mr. Brown worked in the Ambulance Department. Messrs. Bowness, Cilia, Duffy, Haye and Tatone worked in the Property Department. Messrs. Jenkins, Barker and Woods worked in the Social Services Department. Mr. Brown has been a member of the United Brotherhood of Carpenters and Joiners of America (the "Carpenters' Union") for thirty-one years and is presently a member of Local 27 of the Carpenters' Union. He was hired as a casual employee by the respondent through the applicant's hiring hall in November of 1977. During the month of November in 1978, he was engaged in renovating a Gulf Station and making it into quarters for an ambulance station. This involved removing much of the internal fixtures and installing drywall, wooden panelling, partitions, suspended ceilings and cupboards.

13. Mr. Bowness has been a member of the Carpenters' Union for thirty-three years and is presently a member of Local 27 of the Carpenters' Union. He was hired as a casual employee by the respondent through the applicant's hiring hall in April of 1974. During the month of November in 1978 he was engaged in remodelling interior offices at an old candy factory. He removed partitions, cut through plaster walls and installed new doors, frames and partitions. In addition, Mr. Bowness removed a kitchen and installed a washroom with associated work of drywall, waterproofing and insulation. Mr. Duffy is a member of Local 1133 of the Carpenters' Union and was hired as a casual employee by the respondent through the applicant's hiring hall on October 26, 1978. He remained with the respondent until his termination on November 23, 1978. During his employment Mr. Duffy spent some time working with Mr. Bowness. On November 23, 1978, he was performing the same type of work as Mr. Bowness although at a different location.

14. Mr. Cilia has been a member of the Carpenters' Union for eleven years and is presently a member of Local 27 of the Carpenters' Union. He was hired as a casual employee by the respondent through the applicant's hiring hall in September of 1978. In November of 1978 Mr. Cilia worked in a house where he installed drywall and new railings on verandas. In addition he installed and fireproofed new stairs and repaired windows.

15. The parties agreed that the evidence of Messrs. Bowness and Cilia is applicable to Messrs. Haye and Tatone. In addition, it was agreed by the parties that Messrs. Haye and Tatone are members of Local 1963 and Local 27 of the Carpenters' Union respectively and that they were hired as casual employees by the respondent through the applicant's hiring hall in August and May of 1974 respectively.

16. Mr. Jenkins has been a member of the Carpenters' Union for thirteen years and is presently a member of Local 666 of the Carpenters' Union. He works out of a shop and has worked with Messrs. Woods and Barker. He was hired as a casual employee by the respondent through the applicant's hiring hall. Most of Mr. Jenkins work is concerned with Bendale Acres which is a home for the aged operated by the respondent. During November of 1978 Mr. Jenkins either was engaged in erecting metal drywall partitions, door frames and drywall panels and in securing cabinets to walls or was engaged in replacing drywall and doors at a similar home for the aged called Gregg's Manor.

17. Mr. Woods is presently a member of Local 27 of the Carpenters' Union. He has worked for the respondent for twenty-nine years and was hired as a casual employee by the respondent through the applicant's hiring hall. Mr. Woods works on twenty-five apartment buildings for senior citizens and six homes for the aged. He builds and installs cabinets and shelving, hangs new doors and installs drywall. On November 23, 1978, he was working at Bendale Acres and was engaged in installing counters and stalls, repairing a wall and installing drywall. Mr. Woods spends about four-fifths of his time working outside his shop.

18. Mr. Barker has been a member of the Carpenters' Union for more than thirty years and is presently a member of Local 27 of the Carpenters' Union. He was hired as a casual employee by the respondent through the applicant's hiring hall some five and a half years ago. Mr. Barker spends between eighty and eighty-five per cent of his time working outside his shop. On November 23, 1978, he was working at two locations, Collegeview Apartments on Yonge Street and Willowdale Manor, a home for senior citizens. At the first location he was installing wooden rollers in a garage door. At the second location he was converting a bachelor apartment into a one bedroom apartment, erecting kitchen cabinets, installing drywall and repairing a floor.

19. The evidence with respect to the two permanent carpenters who are employees established that they are represented by the intervener. Mr. Moore has been employed by the respondent since its formation and prior to the formation of the respondent he had worked for the City of Toronto since 1947. In November of 1978 Mr. Moore was working in the buildings and grounds section of the respondent's Department of Works. Paul Emery, the Director of Metro Works Department – Water Supply Division, gave evidence that Mr. Moore is a carpenter who works for the majority of his time in a shop. The other permanent carpenter, Mr. Rakovsky, in November of 1978 was working for the respondent in 1954. Murray Browning, the Director of Operations in the Roads Department, testified that the constructions of rough forms in his department is performed by a handyman rather than by

Mr. Rakovsky. He further testified that before November 23, 1978, he had seen Mr. Rakovsky building sand boxes and that he made items such as sand boxes, tool boxes and shelving at a Roads Department yard and that Mr. Rakovsky went to locations to put in the shelving. Neither Mr. Moore nor Mr. Rakovsky gave evidence in this application.

20. The respondent introduced extensive evidence with respect to its own structure and operations. The Board heard evidence with respect to each of the respondent's departments. It is not necessary for the Board to review this evidence in detail. For the most part this evidence served as background information to this application. The respondent employs approximately six thousand seven hundred employees with approximately another one hundred employees who are employed for the licensing commission. Temporary employees are regularly required by the respondent for specific periods. This is particularly true in the Parks Department. There have been no fewer than seventy occasions when the respondent contacted the applicant's hiring hall in order to secure carpenters. In forty-two instances the employment was for six months or less. In twelve instances the employment was between six months and thirteen months. In two instances the employment was between thirteen months and eighteen months. In one instance the employment was between eighteen months and twenty-four months. In two instances the employment was between twenty-four months and thirty months. In one instance the employment was for a period of four years. In four instances the employment was for a period of five years. Some of these carpenters are still employed by the respondent.

21. The evidence established that the respondent's principal business is municipal government. However, as a part of municipal government the respondent offers a wide range of services including the operation and maintenance of parks and a ferry to Toronto Island, the acquisition, leasing and disposal of properties, the operation of an ambulance service, the provision of various social services, a roads and traffic department, the operation of a works department including the supply of water and various other services. In support of these services the respondent also provides various planning and auditing functions. Where the respondent possesses, acquires or plans to construct buildings or structures it necessarily becomes involved in constructing, maintaining or repairing of such buildings or structures. This involves the services of various trades in the construction industry. In addition to employing carpenters on a casual basis, the respondent from time to time also employs cement finishers, painters, plumbers and electricians on a casual basis.

22. In the realm of large capital construction projects the respondent invites tenders on such projects. However, with respect to repairs and small construction projects the respondent may elect to perform such work with its own employees. In 1978 the respondent employed fifty-seven casual employees and tradesmen on repairs and small construction projects. In 1978 the respondent paid approximately one and a half million dollars in wages to these fifty-seven casual employees. The temporary carpenters who were employed by the respondent in 1978 were paid a total of two hundred thousand dollars in wages.

23. At the commencement of the hearing, the intervener adopted the position that the collective agreement between the respondent and the intervener covered the two permanent carpenters but did not cover the ten temporary carpenters. After the applicant and the respondent had introduced their evidence before the Board the intervener sought to adduce evidence with respect to the nature of the work performed by the respondent's handymen and permanent carpenters. The Board ruled that it would not permit the intervener to

call such evidence after the applicant had closed its case because the intervener had, at the commencement of the hearing, taken the position that the two permanent carpenters were covered by the collective agreement between the respondent and the intervener. This had been agreed to by the other parties and no issue had arisen with respect to the handymen. In any event the applicant was not seeking to represent the respondent's handymen.

24. The respondent maintained that it is not an employer within the meaning of section 106(c) of the Act and that this application was therefore not an application within the meaning of section 108 of the Act. The respondent referred to the fact that it is a municipal corporation rather than a business corporation and that it is incorporated for the public good and not for private gain. The respondent emphasized that it is a corporation of all the inhabitants of Metropolitan Toronto whereas other corporations are made up by people with funds to acquire shares and that is answerable to the public in contrast to the people who operate other corporations and are answerable to their shareholders. The respondent pointed out that it is under a duty to provide various services to all members of the public whereas business corporations provide services to people who can afford them.

25. The respondent argued that if it wishes to continue to operate its various processes by tender a certificate from the Board under the construction industry provisions of the Act would mean it would have to act unlawfully because it could not discriminate against non-union employers. The respondent further argued that the construction industry provisions of the Act were never meant to apply to municipal corporations and referred to The Report of The Royal Commission on Labour – Management Relations in the Construction Industry (the “Goldenberg Report”) dated March 12, 1962.

26. The intervener questioned whether the respondent is an employer who operates a business in the construction industry and argued that in the past the Board had always focused on whether employees were performing work in the construction industry rather than whether the employer was operating a business in the construction industry. The intervener argued that the construction industry provisions of the Act were only intended to apply to firms and trade unions involved in a broad sense in the construction industry. The intervener referred to a number of cases which considered the carrying on of business under statutes other than *The Labour Relations Act*. The intervener argued that the very concept of geographic areas was singularly inappropriate because the respondent does not operate in the Board's geographic area #8 other than within the boundaries of Metropolitan Toronto. However, this argument was withdrawn when both the applicant and the respondent informed the intervener that this was not so and that the respondent did operate outside the boundaries of Metropolitan Toronto.

27. The applicant opposed the arguments submitted by the respondent and the intervener and distinguished the authorities which they relied upon. It was the applicant's position that the respondent is not to be treated in a special way under *The Labour Relations Act* and that it was operating a business in the construction industry under the Act.

28. The respondent was established in 1953 under *The Municipality of Metropolitan Toronto Act*, S.O. 1953, c. 73. For many years both before and after 1953 *The Labour Relations Act* contained the following section 89:

“A municipality as defined in *The Department of Municipal Affairs Act*

may declare that this Act does not apply to it or its employees or any of them."

In other words, for many years municipalities had the choice of opting out of the provisions of *The Labour Relations Act*. However, section 37 of *The Labour Relations Amendment Act, 1966*, S.O. 1966, c. 76, repealed section 89. The choice for a municipality to opt out of the provisions of *The Labour Relations Act* no longer exists. The only reference to municipalities presently in the Act is to be found in section 55(11) which provides that where one or more municipalities as defined in *The Municipal Act* is erected into another municipality or two or more such municipalities are amalgamated, united or otherwise joined together, or all or part of one such municipality is annexed, attached or added to another such municipality, the employees of the municipalities concerned shall be deemed to have been intermingled. Section 55(11) has no relation to this application for certification. The Board therefore rejects the respondent's argument that it is to be treated differently from a business corporation because of the many obvious differences between the functions of the respondent and a business corporation. Indeed, the Board notes that the respondent and the intervener are parties to a collective agreement, which the respondent does not impugn, and that the respondent and the intervener have conducted their labour relations under the Act for many years.

29. The respondent contended that the Goldenberg Report in 1962, which preceded the enactment of special provisions with respect to the construction industry in 1962 in *The Labour Relations Amendment Act, 1961-62*, S.O. 1961-62, c. 68, and the special provisions were never intended to apply to municipal corporations. It is true that the appointment of the Royal Commission followed serious labour disturbances in the house and apartment building sector of the construction industry in Toronto. The respondent urged the Board to see what was the law before the special provisions were passed, and what was the mischief or defect for which the law had not provided, what remedy the Legislature appointed and the reason of the remedy. The respondent relied on the fact that in *The Eastman Photographic Materials Company, Limited v. The Comptroller - General of Patents, Designs, and Trade-Marks*, [1898] A.C. 571, the House of Lords had considered the report of a commission which had been appointed to inquire into the duties, organization, and arrangements of the Patent Office under the Trade Marks Act so far as related to trade marks and designs as an accurate source of information as to what was the evil or defect which an Act of Parliament under construction was intended to remedy.

30. However, the dictum of Lord Halsbury in the above case was distinguished in *Assam Railways and Trading Company, Limited v. The Commissioners of Inland Revenue*, [1935] A.C. 445, where Lord Wright expressed the view that on a question of the true construction of an Act a report of a Royal Commission containing certain recommendations was not admissible to show the purpose or object of the Legislature in passing the Act. More recently, the House of Lords in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, refined the use of the reports of commissions and added a caution to the use of such reports. Viscount Dilhorne stated at pages 621 and 623:

"Ever since *Heydon's Case* (1584) 3 Co. Rep. 7a it has been recognised that there are, in connection with the interpretation of statutes, four questions to be considered: (1) what was the common law before the making of the Act; (2) what was the mischief or defect for which the law

did not provide; (3) what remedy Parliament had provided; and (4) the reason for the remedy: see *Eastman Photographic Material Co. Ltd. v. Comptroller-General of Patents, Designs, and Trade Marks* [1898] A.C. 571.

In that case Lord Halsbury L.C. cited a passage from the report of commissioners appointed to inquire into the duties, organisation and arrangements of the Patent Office in relation to trade marks and designs. That passage not only referred to what the existing law was but also to what the commissioners thought it ought to be; and after citing it, Lord Halsbury said, at p. 575:

‘My Lords, I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission.’

Many instances were cited in the course of the argument where the courts have had regard to the reports of such commissions or committees; e.g. in *Rookes v. Barnard* [1964] A.C. 1129 and *Heatons Transport (St. Helens) Ltd. v. Transport and General Workers’ Union* [1973] A.C. 15 to the Report of the Royal Commission on Trade Unions and Employees’ Association, in *National Provincial Bank Ltd. v. Hastings Car Mart Ltd.* [1965] A.C. 1175 to the Report of the Royal Commission on Marriage and Divorce and in *Letang v. Cooper* [1965] 1 Q.B. 232 to the Report of the Tucker Committee on the Limitation of Actions. Other instances could be cited and, despite the observations of Lord Wright with which Lord Thankerton agreed in *Assam Railways and Trading Co. Ltd. v. Inland Revenue Commissioners* [1935] A.C. 445, it is now, I think, clearly established that regard can be had to such reports. ... In *Letang v. Cooper* [1965] 1 Q.B. 232, 240 Lord Denning M.R. said:

‘It is legitimate to look at the report of such a committee, [the Tucker Committee on the Limitation of Actions] so as to see what was the mischief at which the Act was directed. You can get the facts and surrounding circumstances from the report so as to see the background against which the legislation was enacted. This is always a great help in interpreting it. But you cannot look at what the committee recommended, or at least, if you do look at it, you should not be unduly influenced by it. It does not help you much, for the simple reason that Parliament may, and often does, decide to do something different to cure the mischief.’ ”

31. The Board has looked at the Goldenberg Report in order to get the facts and surrounding circumstances from the report so as to see the background against which the legislation was enacted. The special provisions with respect to the construction industry which were enacted in 1962 neither limit their application to any particular sector of the construction industry nor exclude specific classes of employers such as municipal corporations.

32. The issue of whether the respondent is an employer within the meaning of section 106(c) of the Act involves a consideration of whether the respondent is a person who operates a business in the construction industry. The respondent and the intervener referred the Board to a series of cases which considered the word "business". See, for example, the interpretation of the word "business" under the *Lord's Day Act* in *Re Warner and Manitoba Labour Board* (1960) 31 W.W.R. 613, and the interpretation of the words "business" and "business assessment" under *The Assessment Act* in *The Rideau Club v. The Corporation of the City of Ottawa*, [1907] 15 O.L.R. 118. The Board has considered these authorities and is of the opinion that the scheme of the *Lord's Day Act* and *The Assessment Act* are markedly different from *The Labour Relations Act* and offer no assistance in interpreting the provisions of section 106(c).

33. The Board has previously considered the meaning to be given to section 106(c) of the Act. In the *Tops Marina Motor Hotel* case, 64 CLLC ¶16,004, a registered partnership consisting of an investor, a salesman, a lawyer and a builder was formed for the purpose of building and operating a motor hotel. This was the first venture of the partnership. The Board found that the work which was being performed fell within the definition of construction industry in section 1(1)(da) [now section 1(1)(f)] of the Act and that the partnership was the employer of the carpenters who were affected by the application. The Board rejected a contention that in order to operate a business in the construction industry the construction work must be for persons other than those engaged in the work and stated that it was not disposed to place such a general restriction on the word "business". The Board also considered whether the primary or predominant purpose of the operation ought to be the test under section 90(a) [now expressed in section 106(c)] of the Act and stated at page 645:

"This brings the Board to counsel's second argument that the primary or predominant purpose of the operation ought to be the test. The legislation does not use this language, and if that had been the intention of the Legislature, it would have been a simple matter to have said 'employer means a person who operates a business primarily in the construction industry' or some similar wording. Furthermore, it seems to the Board that an employer whose primary business is that of manufacturing but who in addition to selling his products to others, operates a construction division for the purpose of erecting his product at a construction work site, would be excluded automatically from the definition if the test suggested by counsel were to be adopted. Again, the Board is not disposed at the present time to place such a general restriction on the word 'business' as it appears in the section.

There remains for consideration, however, the question as to whether the respondent is operating a business in the construction industry. As has already been noted, the respondent's sole activity at the present time is that of constructing a building. In that sense therefore, its present and sole 'profession', 'trade', 'employment', 'engagement', or 'occupation' (to take some of the meanings of the word 'business') is construction work. However, assuming the present intentions of the partnership are carried through to fulfilment, the partnership will then be engaged in the operation of a motor hotel and in the construction of a second motor hotel. If this turns out to be the case, then in the Board's

view the respondent's 'profession', 'trade', 'employment', 'engagement', or 'occupation' is that of building and operating motor hotels. While it may be that in the long run the respondent will be occupied more with operation than with building, the construction activity is an important and concrete part of its objects. Thus it appears to the Board that whether attention is focused only on the respondent's present activity or on its present activities and future plans, the respondent is operating a business, perhaps not its main business, but nevertheless a business in the construction industry within the meaning of *The Labour Relations Act*."

34. In the instant application the respondent, far from being engaged intermittently in undertaking the work which is being performed by the temporary carpenters, is regularly and continuously engaged in such work. Moreover, while the dollar volume of such work is small in comparison to the construction work which is performed on a tender basis, the dollar volume of such work performed by the carpenters exceeds the dollar volume of many employers who work solely in the construction industry. In addition, the respondent employs more trades than many employers in the construction industry. As the Board stated in the *Tops Marina Motor Hotel* case, *supra*, it is not necessary that the business of an employer in the construction industry is the predominant or primary business. The soundness of that position has become clear over the years when the Board considers the number of large construction projects which have been accomplished by owner-builders and developers. In addition, as the Board stated in the *Kapuskasing Board of Education* case, 72 CLLC ¶16,057, there is no requirement that in order to operate a business an operator of such business must necessarily carry on such venture with a view to making a profit. See also *Canada Labour Relations Board et al. v. City of Yellowknife*, (1977) 76 D.L.R. (3d) 85. Similarly, in *The Board of Trustees of the Roman Catholic Separate Schools for the City of Windsor* case, [1966] OLRB Rep. March 920, this Board, in a proceeding under section 47a [now section 55] of the Act, stated at page 922:

"In the instant case, the term 'business' should be given that interpretation most consistent with the other provisions of *The Labour Relations Act* and which will best effect the purposes of that section of the Act in which the term appears. It should be borne in mind that the Act does not distinguish between public and private business, and contemplates the existence of bargaining rights held by trade unions with respect to 'employers' generally and not simply those engaged in commercial enterprises. Nothing in the Act would suggest that any limitation on the continuance of these bargaining rights should be imposed by virtue of the non-commercial nature of any employer's 'business'. The term 'business' as it appears in *The Labour Relations Act*, therefore, ought not to be qualified by the addition of the adjective 'commercial', but should rather be read as referring generally to the *undertaking* of any employer whose operations are subject to this Act."

35. The respondent raised the issue that it is not a "person" within the meaning of section 106(c) of the Act and relied upon *Rex ex rel. Jacques v. Mitchell* (1924) 55 O.L.R. 286. In that case Logie, J. was interpreting a provision of *The Municipal Act*. He held that the words "or other person" did not include a municipal corporation upon the application of the

ejusdem generis rule of construction. In our view, this construction is not applicable to the provisions of section 106(c) of the Act. The Board notes that section 30(28) of *The Interpretation Act*, R.S.O. 1970, c. 225, provides:

“... ‘person’ includes a corporation and the heirs, executors, administrators or other legal representatives of a person to whom the context can apply according to law; ...”

and that *The Municipality of Metropolitan Toronto Act*, R.S.O. 1970, c. 295, as amended, provides in section 2(1):

“The inhabitants of the Metropolitan Area are hereby continued a body corporate under the name of ‘The Municipality of Metropolitan Toronto’.”

The Board finds that the respondent is a person within the meaning of section 106(c) of the Act.

36. The respondent also argued that the effect of certification and a consequent application of the province-wide collective agreement between the Carpenters Employer Bargaining Agency and The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America would cause it to enact discriminatory by-laws. The respondent referred to *City of Toronto v. Miller Paving Ltd.*, [1965] 1 O.R. 658. In our view, the respondent is anticipating what may be the future requirements of the applicant under a collective agreement. The Board is neither prepared to anticipate the future requirements of the applicant nor the future responses of the respondent. Such matters, if and when they occur, are more properly the consideration of the appropriate forum rather than the Board.

37. Finally, the respondent referred to some of the Board’s own decisions to support its opposition to this application. While in *The Municipality of Metropolitan Toronto* case, Board File No. 0722-77-R (unreported decision dated September 2, 1977), the Board stated that the respondent did not appear to be a person who operates a business in the construction industry as set out in section 106(c), such remarks are clearly *obiter dicta*. The issue in section 106(c) was apparently neither raised nor argued in that case. In the *Corporation of the Township of Loughborough* case, [1975] OLRB Rep. Feb. 122, the Board held that certain work which was being performed by a municipal corporation at the time the application was filed was not construction work. The Board then proceeded in that case to make a finding that the application for certification was not an application within the meaning of section 108 of the Act. In the instant case, the Board is satisfied that the work performed by employees who are affected by this application is work in the construction industry within the meaning of section 1(1)(f) of the Act. These employees perform construction work which is more than of a minor or marginal nature.

38. In order for the applicant to be entitled to a craft bargaining unit under section 6(2) of the Act, it is necessary for the Board to determine that this is an application for certification within the meaning of section 108 of the Act. In order for the Board to make such a determination three conditions must be met. Firstly, the trade union which makes the application must be a trade union within the meaning of section 106(f). Secondly, the employees affected by the application must be employees within the meaning of section 106(b). Third-

ly, the employer which employs such employees must be an employer within the meaning of section 106(c), that is to say, must be an employer which operates a business in the construction industry as defined in section 1(1)(f). There is no issue among the parties that the applicant is a trade union within the meaning of section 106(f) and the Board so finds. On the second issue, the respondent and the intervener made very little representation. The Board has considered the evidence with respect to the work performed by the employees who are affected by this application and finds that on the date of the filing of this application the temporary carpenters were engaged in constructing, altering or repairing buildings and structures at the site thereof within the meaning of section 106(b) of the Act. The respondent is an employer within the meaning of section 106(c) because it is continuously operating a business in the construction industry. For the foregoing reasons the Board finds that this is an application for certification within the meaning of section 108 of the Act.

39. The respondent and the intervener have rigorously opposed this application for certification. They seek to prevent the temporary carpenters from being represented by the applicant in collective bargaining under *The Labour Relations Act*. For almost a quarter of a century the respondent and the intervener have been parties to a collective agreement and for almost a quarter of a century the intervener has not sought to represent the temporary carpenters in collective bargaining. The applicant provides temporary carpenters to the respondent through its hiring hall and the respondent pays wages to the temporary carpenters according to the province-wide collective agreement which had been referred to earlier. There is no legal requirement for the payment of wages to the temporary carpenters in accordance with the province-wide collective agreement. The respondent is abiding by some of the terms of the province-wide collective agreement as a matter of grace and not as a matter of right or obligation. The applicant is seeking to formalize its relationship with the respondent. This is not surprising when it is recalled that all of the employees who are affected by this application are members of some of the constituent locals of the applicant and, in most cases, have been members of the Carpenters' Union for many years. Their connection with the applicant is not only retrospective, it is prospective because it is to the applicant that they must look when their temporary employment with the respondent is terminated.

40. A bargaining unit of carpenters and carpenters' apprentices is appropriate for collective bargaining. It only remains to precisely define the appropriate bargaining unit in the circumstances of this application. The two permanent carpenters also perform some work which may be regarded as work within the meaning of section 1(1)(f) of the Act. The Board finds that the two permanent carpenters perform some construction work within the meaning of section 1(1)(f) even though such work appears to require a lower order of skills compared to the work performed by the temporary carpenters. The Board has determined that this is an application for certification within the meaning of section 108 of the Act and the appropriate bargaining unit is to be restricted to construction projects.

41. The Board further finds that all carpenters and carpenters' apprentices employed by the respondent on construction projects in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman and carpenters covered by a subsisting collective agreement between the respondent and the intervener made on July 14, 1978, constitute a unit of employees of the respondent appropriate for collective bargaining.

42. For the purposes of clarity the Board declares that persons engaged in maintenance work are not included in the bargaining unit.

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44. A certificate will issue to the applicant.

0534-79-M The Toronto Building and Construction Trades Council and International Union of Bricklayers and Allied Craftsmen, Local 2, Applicants, v. **Napev Construction Limited**, Respondent, v. Masonry Contractors' Association of Toronto, Intervener #1, v. Venice Masonry Contractors (Toronto) Limited & Co., Intervener #2, v. Bricklayers, Masons Independent Union of Canada, Local 1, Intervener #3.

Arbitration – Parties – Section 112a – Whether trade union not party to collective agreement having status before Board in arbitration proceedings – Board considering Rules of Procedure

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

DECISION OF THE BOARD; January 25, 1980.

1. Bricklayers, Masons Independent Union of Canada, Local 1 ("Local 1") has written to the Board asking that it reconsider its decision of September 17, 1979.

2. In its decision of September 17, 1979, [1979] OLRB Rep. Sept. 886 the Board ruled that neither Local 1 nor the other two interveners had status to participate in a hearing of the merits of a grievance filed by the applicants against Napev Construction Limited ("Napev"). The grievance had been referred to the Board pursuant to section 112a of *The Labour Relations Act*. Having regard to Local 1's contention that underlying the grievance was a jurisdictional dispute between it and International Union of Bricklayers and Allied Craftsmen, Local 2, the Board did adjourn the section 112a proceeding so as to allow Local 1 to file, and the Board to consider, a jurisdictional complaint under section 81 of the Act. Local 1 now seeks to have the Board reconsider its finding that Local 1 lacks status to participate in a hearing on the merits of the grievance.

3. In support of its request for reconsideration Local 1 has made the following representations:

"Secondly we would ask that the Board reconsider their decision in accordance with the Rules. In particular we ask them to reconsider because they have relied on the case of *Napev Construction Limited and Vepan Leaseholds Limited* (1976) OLRB Rep. March 109. Since that decision new regulations have been promulgated and particularly On-

tario Regulation 676-75 sub-section 22 in part, which included forms 78, 79, 80 and 81. Form 78 in paragraph 2 requires that the name and address of any person(s) other than the respondent who may be affected by the referral and there is an asterisk in front of this number which at the bottom of the form reads "other employees who may be affected by a determination under this section are entitled to notice of arbitration proceedings and to be represented by counsel or otherwise at the hearing."

Underneath in capital letters is the following 'FAILURE TO PROVIDE THE NAMES OF EMPLOYEES WHO MAY BE AFFECTED COULD RESULT IN A POSTPONEMENT OF THE HEARING.'

Form 80 is a 'Notice to affected persons of referral of grief [sic] as to arbitration under section 112a and of hearing, construction industry before the Ontario Labour Relations Board.'

Form 81 which is the reply to a referral has at the bottom of the form 'Note' 'Other employees who may be affected by a determination under this section are entitled to notice of the arbitration proceedings and to be represented by counsel or otherwise.' And further in capital letters 'FAILURE TO PROVIDE THE NAMES OF EMPLOYEES COULD RESULT IN A POSTPONEMENT OF THE HEARING.'

These forms coming after the Napev case clearly demonstrates that the legislature and/or the Lieutenant-Governor in Council intended that notice should be given to any person affected which would include workers on the site and their Union, and it is our submission that they constitute irrefutable evidence that the Napev principle is not to be followed."

4. The *Napev Construction and Vepan Leaseholds Limited* case referred to in Local 1's request for reconsideration involved a referral of a grievance under section 112a as well as an application under section 1(4) of the Act. In that case the Board in an initial decision dated October 7, 1975 determined that Napev Construction and Vepan Leaseholds should be treated as one employer for the purposes of *The Labour Relations Act*, and that a collective agreement between Napev and The Toronto Building and Construction Trades Council and its affiliated unions was also binding upon Vepan. The Board went on to conclude that the collective agreement in question had been violated by Vepan's action in letting out work to contractors who did not employ members of the unions affiliated to the Toronto Building and Construction Trades Council. Subsequent to the Board's decision of October 7, 1975, Local 1 sought to intervene in the proceedings contending that it should have been given notice of, and an opportunity to participate in, the proceedings. It based its contention on the grounds that its members had been employed by one of the subcontractors who had been performing work for Vepan. Interestingly enough, Local 1 confined its request to intervene solely to the proceedings under section 1(4), conceding that it lacked status to intervene in the arbitration proceedings under section 112a. The Board in a decision dated March 19, 1976, concluded that at all material times Local 1 was lacking in status to participate in the section 1(4) proceedings since any injury to it which might have resulted from the Board's

earlier decision would have arisen only commercially and incidentally rather than legally and directly. This decision was subsequently upheld by the Divisional Court on Judicial Review. See: *Bricklayers, Masons Independent Union of Canada, Local 1 v. Ontario Labour Relations Board*, unreported decision released May 24, 1977.

5. The forms referred to in the request for reconsideration are contained in the Board's Rules of Procedure which are established by Regulation under *The Labour Relations Act*. The forms were first added to the Board's Rules by O. Reg. 676/75 which was published in the Ontario Gazette on September 6, 1975; that is, prior to rather than after the Board issued its initial decision in the *Napev-Vepan* matter, and well before the Board's determination that Local 1 lacked status to intervene in the proceedings. Accordingly, it cannot be reasonably said that the wording of the forms was somehow an indication to the Board that it should no longer follow its reasoning in the *Napev-Vepan* case.

6. As for the reference on the forms to persons who may be affected by a referral under section 112a, this likely reflects the fact that where a grievance deals with the rights of an employee in the bargaining unit covered by the collective agreement being grieved under, and the union is taking a position adverse to that employee's interest, then the employee is entitled both to notice of the arbitration hearing and to participate at the hearing in his own right. See: *Re Hoogendoorn and Greening Metal Products & Screening Equipment Co.* (1967), 65 D.L.R. (2d) 641 (S.C.C.).

7. There is nothing in the request for reconsideration which would cause the Board to vary or revoke its determination that Local 1 lacks status to participate in a hearing on the merits of the grievance filed by the applicants. Accordingly, the request for reconsideration is denied.

1198-79-U Andy Grecco, Complainant, v. The Ontario Paper Company Limited and Canadian Paperworkers Union and its Local 84, Respondents.

Duty of Fair Representation – Delay in filing complaint attributable to solicitors – Whether Board barring complaint on merits – Union refusing to process grievance to arbitration – Considering matter at regular union meeting – No violation of section 60

BEFORE: Rory F. Egan, Vice-Chairman.

APPEARANCES: *J. N. Smith for the applicant; G. W. Hately, Q.C. and Jim Beamish for the respondent company; Douglas J. Wray and others for the respondent union.*

DECISION OF THE BOARD; January 16, 1980.

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2. This is a complaint that the complainant has been dealt with by the respondents contrary to the provisions of section 60 of *The Labour Relations Act*.

3. Section 60 provides:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

4. The complainant who had been employed for two years as a labour pool worker, was discharged by the respondent, The Ontario Paper Company Limited, on September 5, 1978. This complaint was filed with the Board on September 24, 1979.

5. The respondent union took a preliminary position that the complaint ought to be dismissed because of the long delay in bringing the complaint on and because the complainant had failed to exhaust union procedures before taking an independent course of action.

6. We deal first with the preliminary motion.

7. The evidence is that on the date of the complainant's termination a meeting was held in the office of V. J. Lomore, Personnel Manager. Present at the meeting were Lomore, Murray Beange, Employment Supervisor, and C. Myszak for the company. Mr. R. Hartle, President of the union and the complainant also attended this meeting.

8. The result of this meeting was that following a discussion of the matter the grievor was dismissed. There is a dispute as to the quality of the representations made on behalf of the grievor by Hartle at the meeting which need not be dealt with at this point.

9. A further meeting was held with representatives of the company, Hartle and the complainant. The witnesses were in disagreement as to the date upon which this meeting was held but the complainant admitted that he might be mistaken. The Board finds that it occurred on September 26, 1978. The result of this meeting was that the company reconfirmed the discharge of the complainant.

10. The complainant testified that he telephoned the union up to three times a week up to September 20th in an attempt to have the local president, Hartle, contact the International.

11. On November 20, 1978 the union advised the complainant that a meeting was being held on the evening of that date and he was invited to attend. There is a dispute as to whether the local president had notified the complainant earlier than November 20th which, in any event, was a regular meeting date, concerning the meeting, but none as to his being told about it late on November 20th. The complainant said that he told Hartle that he had arranged to pick up a friend at the Toronto Airport and therefore felt unable to attend the meeting. At this time, the complainant said he told Hartle that he had retained a firm of lawyers.

12. It was the union's evidence that nothing further was heard from the complainant from November 20, 1978 until July 3, 1979. At that time a firm of solicitors in St. Catharines

telephoned Hartle concerning the complainant's case. This call was followed by a letter from the solicitors to Hartle in which they advised they were the solicitors for Andrew Grecco, the complainant herein, and set out a request for the circumstances surrounding the dismissal.

13. Hartle replied to the above letter on July 23, 1979. Hartle's letter set out the circumstances of the dismissal and the history of events as he understood them. He concluded the letter by stating that nothing had been heard by the union from November 20, 1978 until receipt of the solicitor's letter of July 3, 1979. Receipt of the union's letter was acknowledged by the law firm by letter dated July 27, 1979.

14. The next communication received by the union was a copy of this complaint which, as we have already indicated, was filed on September 24, 1979.

15. It is on the basis of the overall lapse of time that the union asks that the matter be dismissed by the Board in the exercise of its discretion under section 79 of the Act.

16. The complainant took the position that he had acted with reasonable promptness against the union under section 60 and had consistently attempted to follow the matter up through his solicitors whom he had retained about November 15, 1978. He submitted that he ought not to be held responsible for the delay which he felt was attributable to the solicitors who, according to his evidence, assured him from time to time when he inquired, that the matter was proceeding to a conclusion. The solicitors to whom the complainant referred were not on record with the Board and were, consequently, not notified of these proceedings and did not participate in them in any way. The complaint was, according to the complainant's evidence, prepared and filed by the solicitors but over the signature of the complainant. The complainant testified that the solicitors advised him they would not represent him at the hearing. The complainant was represented by counsel from a different firm at the hearing.

17. The complainant had also sought assistance through the Board in October 1978 and entered into evidence a letter received from the solicitor for the Board dated October 30, 1978, in reply to his inquiry as to how to proceed.

18. The Board has consistently held that in proceedings before it a party cannot evade the mistakes made by counsel whom it has retained. In *Addressograph-Multigraph of Canada Limited*, [1968] OLRB Rep. March 1183, the Board dealt with the question of the filing of an intervention in an application for certification subsequent to the terminal date fixed by the board. The membership evidence and the documents in support of the intervention had been prepared in time but through a failure of an employee of the solicitor for the intervenor, they were not mailed in accordance with his instructions and arrived at the Board after the terminal date. In that case the Board said in response to a submission that the terminal date be extended by reason of the error of counsel at paragraph 17:

"While counsel for the intervenor argued that his client should not be saddled with his mistake or the mistake of his employee, the Board is of the opinion that a client must assume responsibility for the mistake of his solicitor. It cannot seriously be argued that legal counsel can make mistakes with impunity or that their mistakes do not carry the same

weight as similar mistakes made personally by a party. We are of the view that counsel's responsibilities are no less onerous than the responsibilities imposed upon a party in any proceeding and a party cannot evade the results of mistakes made by counsel retained by the party."

The Board refused to extend the terminal date and insisted that there be strict compliance with the requirements of the Rules in that respect. The Board then dismissed the intervention.

19. It might be noted that in the *Addressograph-Multigraph* case, *supra*, the Board was dealing with a situation where there a time limitation fixed by the Rules of the Board for the filing of the intervention.

20. In *Canadian Union of General Employees*, [1975] OLRB Rep. April 320, the Board dealt with a request for reconsideration of a decision made against the respondent union where counsel for the respondent union failed to attend a hearing set by the Board. The Board rejected the argument that the respondent ought not to be penalized by the mistake of his lawyer and that the Board should distinguish between errors committed by the respondent itself and errors committed by the applicant. The Board noted that the same kind of argument had been raised and rejected in the *Soo Dairies Limited* case, [1968] OLRB Rep. April 115, where a lawyer had failed to notify his clients of a hearing date. The Board also relied upon the *Addressograph-Multigraph Canada Limited* case cited above.

21. The Board in the *Canadian Union of General Employees* case, *supra*, in denying the request for reconsideration said that it saw no reason to deviate from the principles set out in the cases dealing with the client-solicitor relationship to which it had referred. It might again be noted that in dealing with the request in itself, the Board pointed out that one of the principal purposes of an administrative agency is to process matters that come before it with expedition and economy. The Board said that to rehear cases because one party forgot to attend a hearing would substantially impair this end.

22. The issue before the Board in *Adventure Construction Limited*, [1975] OLRB Rep. April 371 was whether a group of objectors should be prejudiced by the innocent mistake committed by their counsel in failing to file with the Board by the terminal date the correct documents evidencing opposition of certain employees to the certification of an applicant union. The Board adopted the position taken in the cases referred to above and denied a request for reconsideration on the basis that the mistake of the solicitor was the mistake of the client.

23. It is clear from the foregoing cases that the Board has consistently held that errors made by counsel are viewed as errors made by the client and that no relief will be granted a party because of the actions or lack thereof of its solicitor or counsel.

24. The Board, in the present instance, applying the same reasoning, finds that the complainant must accept personal responsibility for the delay in prosecuting the complaint. The question remains as to whether the complainant's delay is fatal to his case as the respondent union submits. Although Hartle, as we have already noted, denied it, Grecco testified that he was told by Hartle on November 20, 1978 that the union would not arbitrate his case. The complaint was not filed until September 24, 1979, some ten months later.

25. Counsel for the respondent referred to the Board in support of his request for dismissal because of delay in the decision of the Board in the case of *CCH Canadian Limited*, [1977] OLRB Rep. June 351. This case involved a complaint brought by Toronto Typographical Union No. 91 against CCH under section 79 alleging a breach of section 58 of the Act. The alleged offence underlying the complaint occurred in March of 1976. The decision of the Board is dated June 20, 1977. The date of filing is not indicated.

26. The attention of the Board was directed to paragraph 3 of the *CCH* decision. That paragraph reads:

“The Board as a general rule will not refuse to entertain a complaint under section 79 only because of a delay in lodging the complaint. Where unreasonable delay has occurred, the Board in most cases will simply take this factor into account in assessing any compensation which might be awarded. In the instant case, however, we are of the view that because of the extreme delay in the filing of the complaint and, in the circumstances, the lack of any mitigating factors which might justify or excuse such a delay, the Board should exercise its discretion under section 79 of the Act and refrain from inquiring into the complaint.”

As the paragraph plainly indicates, the circumstances surrounding the delay in each case and the extremity of the delay have to be considered against the general rule and a decision arrived at upon the particular facts before the Board.

27. The matter is further dealt with in the *Concrete Construction Supplies* case, [1979] OLRB Rep. Aug. 739 where the Board stated:

“It is not the practice of the Board to bar complaints under section 79 unless there has been extreme delay. In the case of complaints involving alleged violations of section 60, the Board’s practice has usually been to hear the complaint and consider delay, if it is unreasonable, when considering the relief to be given.”

In the foregoing case a delay of eight months was held not to be too extreme and the Board proceeded to hear the case. (See also the *Irving Posluns Sportswear* case, Board File No. 0365-79-U, October 1979, which the Board, in the exercise of its discretion under section 79, decided to hear the merits of the case notwithstanding a delay from July 1978 to May 1979 with respect to certain allegations, but refused to hear others because of an extreme lapse of time between their occurrence and the date of filing.)

28. In the circumstances of the present case and following the practice outlined in the cases cited immediately above, the Board, having in mind the fact that the delay can be taken into account in the event that a question of relief arises, will not bar the complaint from being heard. The Board accordingly now proceeds to inquire as to whether the respondent union in the representation of the complainant acted in a manner that was arbitrary, discriminatory or in bad faith.

29. As already noted, the grievor was discharged on September 5, 1978 at a meeting held in the office of Mr. Lomore. The complainant and Hartle had had no opportunity to

discuss the matter before the hearing commenced. The evidence introduced by the union shows that Lomore set out the grounds upon which the discharge was based. He told Grecco and, of course, Hartle heard him, that the Groundwood foremen had complained that he had not performed work required on the grinders on August 30th and 31st. Lomore also told the meeting that a worker on the #6 Grinder had complained to the foreman that Grecco would not help him pull wood for the bin to help keep the grinders full. An additional ground was that Grecco had failed to carry out instructions to the foreman to clean up the grinder. Reference was also made to Grecco leaving his area at 2:40 p.m. without being relieved and to the fact that the foreman of the Sulphide department was not satisfied with Grecco's work performance. A further basis given for the discharge was that Grecco had previously been given a verbal and a written warning for leaving the job early. The evidence is that Lomore summarized the reasons for discharge as being Grecco's poor work record and complaints from departments.

30. The complainant acknowledged that a series of accusations was made against him at the September 5th meeting. His evidence was that Hartle gave what he, the complainant, said was token support. He explained that Hartle would attempt to say something but that Lomore spoke over him and would not let Hartle say anything. The point is, however, that the complainant admits that Hartle was attempting to support him and was being suppressed by management. Grecco also complained that he was not given an opportunity to give an explanation. This, of course, is not something that can be attributed to any representational failing on Hartle's part. Incidentally, it is also not in complete accord with the Minutes of the meeting which indicate that the grievor did make representations.

31. Hartle's evidence is that he argued that it was a stiff sentence to fire an employee on this account and requested the company to reconsider its opinion. His request was turned down by Lomore.

32. Grecco testified that Hartle told him that he thought the decision was rather harsh. He stated that he asked what he was going to do about it and the latter said that "his job did not hold a lot of authority but that he would do his best".

33. The complainant says that two days later he phoned Hartle to ask if anything had happened and that Hartle told him that another meeting had been arranged for the following day. As already indicated, there was a difference of opinion as to the date of this second meeting. In any event, the complainant stated that Hartle had advised him that there were 48 hours in which to grieve the discharge.

34. Section 32.03 of the collective agreement provides as follows:

"If a discharged employee claims that an injustice has been done him, an appeal shall be made to the General Manager within two working days (Saturday, Sunday and holidays excepted), and if it is found that the employee has been unjustly dismissed, he shall be reinstated and shall be paid for the working time he has lost as a result of his dismissal."

35. There was no dispute that the second meeting which was attended by the Mill manager did not occur within the period stipulated in the collective agreement. Hartle says

the appeal was not made by the union because it has always been the policy for the incumbent [sic] to be the aggressor and that it is never the Local that is the aggressor. In any event, Hartle did arrange for the second meeting and there appears to have been no objection raised by the company, on the basis of section 32.03 of the agreement that time had expired.

36. Hartle's testimony was that at the second meeting he requested the company to take Grecco back. He also asked that the company, in the alternative, consider a less severe penalty. The company spokesmen repeated the reasons for discharge and refused to reconsider the matter.

37. The complainant testified that Hartle made several attempts at the meeting to speak on his behalf but that the company overruled him and would not give him a chance to speak. Grecco said, however, that when the company alleged that he was not pulling logs properly, Hartle argued on his behalf that there were not too many men who did.

38. It is apparent on Grecco's own evidence that up to this point Hartle had made an effort, frustrated to some extent by the company spokesmen, to help Grecco against a rather heavy list of allegations of misconduct put forward by the company. It is equally clear that while Hartle assured Grecco that he would do his best and see what he could do, he also was letting Grecco know that in his opinion there was not much hope of success in resisting the company case.

39. Grecco told the Board that following the second meeting he asked Hartle to continue to pursue the case, possibly to arbitration or whatever the next step might be. He said that he kept attempting to contact Hartle by phone two or three times a week between the second meeting and November 20, 1978 and asked whether he had contacted the International Office. He said Hartle told him that the international representative was away. He also testified that during this period he wrote to the Ontario Labour Relations Board concerning his case. He produced a letter from the solicitor for the Board which confirmed that he had made inquiries there concerning the prosecution of his case. There is no doubt that Grecco was anxious to have his case brought to arbitration. Indeed, the evidence indicates that the core of his complaint is not so much the representations made by Hartle at the meetings but the fact that his demand for arbitration was not complied with by the union.

40. There is a conflict in evidence between Grecco and Hartle as to what transpired following the second meeting. Hartle says there was no discussion but that Grecco got mad and left the meeting immediately. Hartle testified that he had one phone call from Grecco in October in which the latter inquired as to what was being done. Hartle said he told Grecco that he would have to take the question to the floor for the decision of the membership. Hartle said that he told Grecco that this would occur at the regular meeting of the union in the third week of November on the 20th.

41. Grecco denies that he had advance notice of a meeting for November 20th. However, his evidence and that of Hartle confirm that in the evening of the very day of the meeting, Grecco called Hartle. He said that he asked Hartle if he had contacted the International and if the union was going to go to arbitration and that Hartle said it was not. He testified that he told Hartle that he had hired a lawyer. He says Hartle asked him to attend the meeting that night. It was to start in about five minutes' time, he said. Grecco told Hartle that he could not attend because he had to meet a friend at the airport and suggested coming to an-

other meeting. He said that Hartle would not agree to postpone the matter to another date. From that point on, Grecco did not deal with the union but left the matter in the hands of his lawyer. Grecco said that he had not contacted the union from November 20th on because the union had said they were in no position to defend him.

42. Hartle testified that he did not tell Grecco on November 20th that the union would not take his case to arbitration. Hartle also testified that he told Grecco, during the telephone conversation, that it would be in his interest to attend the meeting. He could not recall, however, whether Grecco had said he could not come to the meeting.

43. In any event, there was evidence that establishes that Grecco's case was, in fact, discussed at the union meeting. This was confirmed by a witness called by Grecco who had attended the meeting. Hartle's evidence is that the Executive was split on the question as to whether Grecco's case should go to arbitration and a committee of two stewards and the President was appointed to investigate the matter further and bring back a recommendation to the floor as to whether to go to arbitration or not. Clearly, no action detrimental to the complainant's case was taken in his absence and the matter was not closed out by the union at this point. The evidence is that Grecco was advised by another employee who so testified, as to what had happened at the meeting.

44. It was the position of the union that since there was no further word from Grecco following the conversation of November 20th, it was reasonable to assume that he had decided not to pursue the matter further. The union had been made aware by Grecco that he had retained counsel to act on his behalf and took the position that it was not part of its duty to seek out Grecco or the counsel he had elected to engage to see what, if anything, he wanted done and that any initiative should come from him or from the counsel whom he had chosen to represent him. This appears to be not an imprudent or unreasonable view of the situation.

45. Grecco, on the other hand, stated that he did not communicate with the union because he understood that it had decided it was not going to go to arbitration and he therefore dealt only with his solicitors from November 20th on. The result was as indicated earlier and it was not until the filing of this complaint that the union realized that the matter was still being pursued by the complainant.

46. In light of all of the evidence, the Board finds that the actions of the union throughout were not arbitrary, discriminatory, nor carried out in bad faith and the complaint is accordingly dismissed.

0174-79-R Construction Workers Local No. 6 affiliated with the Christian Labour Association of Canada, Applicant, v. **Per-fec-tion Insulations Limited**, Respondent, v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Intervener.

Trade Union Status – Purported merger between two unions – Constitution not permitting merger – Minutes of convention not disclosing adoption of constitution – Status not established

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Balentine.

APPEARANCES: *Owen V. Gray and Ed Vanderkloet for the applicant; Robert Flynn for the respondent; S. B. D. Wahl and J. Duffy for the intervener.*

DECISION OF THE BOARD; January 15, 1980.

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2. The applicant has applied for certification with respect to a bargaining unit of insulators and insulators' apprentices employed by the respondent in the province of Ontario save and except non-working foremen and persons above the rank of non-working foreman.

3. The intervener has bargaining rights for the employees who are affected by this application. There was no dispute that this is a timely application under the provisions of sections 5 and 53 of the Act.

4. However, the intervener has challenged the status of the applicant Construction Workers Local No. 6 affiliated with the Christian Labour Association of Canada ("Construction Workers Local No. 6") to apply for certification. More specifically the intervener has challenged the status of Construction Workers Local No. 6 as a trade union under section 1(1)(n) of the Act.

5. The Christian Labour Association of Canada (the "CLAC") was first established in the spring of 1952. The CLAC made a series of applications for certification before the Board during the nineteen fifties. These applications were dismissed by the board because of certain restrictions which were contained in its constitution. See the *Bosch & Keuning (Canada) Limited* case, 54 CLLC ¶17,086; and the *Woodbridge Concrete Products Limited* case, 58 CLLC ¶18,105. In 1961 the CLAC again applied for certification and in the *Tange Company Limited* case, 62 CLLC ¶16,224, the Board again dismissed the application because of the provisions of its constitution which were viewed by the Board as imposing restrictions on eligibility for membership based on creed. At about this time a minority of the members of the CLAC favoured the deletion of certain provisions of the constitution and broke away to form a separate trade union with the name Christian Trade Unions of Canada (the "CTUC"). The CLAC, however, continued in existence and in 1963, as a result of the decision of the High Court in *Trenton Construction Workers Association, Local 52 and Tange Company Limited*, [1963] 2 O.R. 376, the Board determined that both the CLAC and CTUC were trade unions under the Act and commenced to entertain and issue certificates to them when they satisfied the other requirements of the Act. However, the unhappy dif-

ferences which arose between the CLAC and the CTUC continued for almost two decades. In recent years exploratory and informal talks were held between representatives of the CLAC and the CTUC with a view to settling past differences and to a merger of the two entities.

6. On October 11, 1978, the secretary of the Construction Workers Local 6 which was affiliated to the CTUC sent a letter to its members by mail. This letter set forth the agenda for a meeting to be held on Saturday, October 21, 1978, commencing at 2:00 p.m. in the Boardroom of the DUCA Credit Union Ltd., 86 Hester Street in Hamilton. The letter stated under item 5 of the agenda:

“5. Discussion and voting on the following motion:

‘That as of February 1, 1979 Construction Workers Local 6 cease to be affiliated with the Christian Trade Unions of Canada (C.T.U.C.) and becomes affiliated with the Christian Labour Association of Canada (C.L.A.C.).’”

7. In October of 1978, there were about 165 members of the Construction Workers Local 6 and 27 members attended the membership meeting on October 21, 1978. There was some discussion of the motion set forth in the preceding paragraph and the motion was voted upon by secret ballot. The motion was adopted by the votes of the twenty-six members who cast ballots. The minutes of this meeting were introduced into evidence by the secretary of the Construction Workers Local 6. These minutes are unfortunately deficient in a number of respects. Firstly, the form of the motion which was placed before the meeting was not recorded. Secondly, although witnesses who appeared before the Board gave evidence that the constitution of the CLAC was available for members to read during a coffee and donut break, there is no reference to the constitution of the CLAC in the minutes of the meeting of October 21, 1978.

8. In a letter dated November 9, 1978, and signed by Wiliam Smit – President, John Geerts – Secretary, “the Board of Local 6” purported to apply to the CLAC for affiliation. In a letter of the same date the same two persons wrote to the National Executive Board of the CTUC and stated that Construction Workers Local 6 wished to discontinue affiliation with the CTUC effective as of February 1, 1979. In a letter dated November 14, 1978, the Secretary of the National Executive Board of the CLAC informed Construction Workers Local 6 that upon motion it was resolved that Construction Workers Local 6 would no longer be affiliated with the CTUC effective February 1, 1979.

9. In a further letter to the National Executive Board of the CTUC dated November 9, 1978, the Construction Workers Local 6 proposed an amendment to the constitution of the CTUC by adding the following statement to article VIII:

“The National Executive Board of the Christian Trade Unions of Canada shall have the authority to enter into a merger with another labour organization committed to similar aims, should such a merger be approved by a two-thirds majority vote at an Annual Convention. The assets and liabilities of the organization will be transferred to the successor union if the Annual Convention by a two-thirds majority vote decides to merge with another labour organization.”

10 The National Executive Board of the CTUC in a Notice dated November 14, 1978, stated:

“NOTICE OF AMENDMENT TO THE CONSTITUTION TO BE VOTED UPON AT THE CONVENTION 1979 to be held in early January 1979.

Dear Friend:

In accordance with Article IX of the C.T.U.C.'s constitution the N.E.B. of the C.T.U.C. herewith presents the following two resolutions to be voted upon at the Convention 1979.

Resolution #1 presented by Construction Workers Local #6 and recommended for acceptance by the N.E.B.

That the Constitution of the Christian Trade Unions of Canada be and the same is hereby amended by adding the following statement to Article VIII.

‘The National Executive Board of the Christian Trade Unions of Canada shall have the authority to enter into a merger with another labour organization committed to similar aims, should such a merger be approved by a two-third majority vote at an Annual Convention. The assets and liabilities of the organization will be transferred to the successor union if the Annual Convention by a two-thirds majority vote decides to merge with another labour organization.’

Resolution #2

‘The Christian Trade Unions of Canada shall merge with and be absorbed by the Christian Labour Association of Canada with the Christian Labour Association of Canada becoming the successor trade union effective February 1, 1979. All rights, privileges, duties, assets and liabilities of the Christian Trade Unions of Canada will be taken over and assumed by the Christian Labour Association of Canada as the successor union.’

Voting on these resolutions will be done by the delegates attending the Convention in accordance with Article IX of the C.T.U.C.'s constitution which reads in part;

‘The Annual Convention of the organization shall be held as soon as possible after the end of the organization's fiscal year. Each affiliated Local has the right to be represented at the Annual Convention by one official delegate. Delegates shall have voting power according to numerical strength of the Locals they respectively represent, on the basis of one vote for any number of members up to twenty-five and thereafter one additional vote for each additional twenty-five or major fraction thereof.’

Although the Constitution calls for you to be represented by one official delegate, members are welcome to attend.

You will be informed later about the date and the place where the Convention will be held.

For the N.E.B. of the C.T.U.C.

Don Jeffrey, Secretary.”

11. The annual convention of the CTUC was held on January 20, 1979. The two resolutions referred to in the preceding paragraph were presented at the convention. The minutes of this convention were not introduced into evidence. Although oral evidence was introduced with respect to this convention, this evidence was not satisfactory because there was no reliable evidence on the wording of the two resolutions which were voted upon at the convention. In a letter dated January 20, 1979, the National Executive Board of the CTUC advised the CLAC of the adoption of the two resolutions. In a memorandum of agreement dated February 10, 1979, the CLAC and CTUC provided for the merger of the CLAC and the CTUC and the absorption of the CTUC by the CLAC.

12. Two issues were placed before the Board. Firstly, the purported merger between the CLAC and the CTUC. Secondly, the viability of the Construction Workers Local 6 on the date of the making of this application. With respect to the first issue, in the decision of the Ontario Court of Appeal in *Astgen et al. v. Smith et al.*, [1970] 1 O.R. 129, Evans, J.A., in writing the decision of the majority, held that the members of a trade union are related one to another by contract, the terms of which are set forth in the constitution of the trade union. Evans, J.A. pointed out that the contract is not between the member and some undefined entity which lacks the capacity to contract but rather there is a complex of contracts between each member and every other member of the trade union. The learned judge pointed out that where one trade union merges with another trade union the result is the extinction of the contractual rights *inter se* of each member of the first trade union and the substitution of a set of contractual rights binding the members of the first trade union not only to one another but also individually to every other individual in the second trade union. Evans, J.A. held that there is no inherent power in a voluntary association, such as a trade union, to merge with another and that a merger could be accomplished in one of two ways. The first way is by the unanimous concurrence of every member in the trade union. The second way is by action in which each of the members of the trade union has either expressly or impliedly agreed to be binding upon him for the purpose of terminating his existing contractual rights and obligations and bind him to other contracting members in the new contractual relationship. There is no provision in the constitution of the CLAC to merge with other trade unions. Similarly, the constitution of the CTUC contained no provisions with respect to merger until at least January 20, 1979. The evidence with respect to this convention is most unsatisfactory and the Board is not prepared to find that the CTUC proceeded in conformity with the steps referred to by Evans, J.A. in *Astgen et al. v. Smith et al.*, *supra*. The Board is not prepared to find that the purported merger is a valid merger. With respect to the second issue, the evidence establishes that the members of Construction Workers Local 6 never adopted the constitution of the CLAC. Quite clearly Construction Workers Local 6 has given up the constitution of the CTUC. In the *James B. McGregor – Division of Toby Industries Limited* case, [1976] OLRB Rep. October 643, the Board stated:

“The Board’s concern for the constitution and the regularity of its adoption in that circumstance is not borne of devotion to mere technicality, but out of the Board’s fundamental concern that the applicant be a viable entity to carry out the purposes described in section 1(1)(n) of *The Labour Relations Act*. If a constitution were not properly adopted or, if properly adopted, not properly adhered to, questions might arise as to whether those who purported to be its officers duly appointed or elected under the constitution were indeed its officers at all, and if not, whether it could be considered a viable entity for carrying out the purposes described in the Act.”

12. The Board finds that Construction Workers, Local 6 does not have duly elected officers and that it was not a viable entity at the time this application was filed with the Board. While the constitution of the CLAC may have been referred to at the meeting on October 21, 1978, the constitution was in no way adopted by the persons who were present. In these circumstances the Board is not prepared to find that the applicant is a trade union within the meaning of section 1(1)(n) of the Act because the applicant is not, on the evidence before the Board, an organization of employees within the meaning of section 1(1)(n).

13. This application is dismissed.

2067-78-R Association of Commercial and Technical Employees, Local 1704 C.L.C., Applicant, v. **Province of Ontario Board of Internal Economy**, Respondent.

Certification – Government paying salaries for MPP’s constituency office secretaries – Whether Government or MPP is employer

BEFORE: M. G. Picher, Vice-Chairman and Board Members M. J. Fenwick and J. D. Bell.

APPEARANCES: *Edward H. Wright for the applicant; Janice Baker and W. S. Wilson for the respondent.*

DECISION OF THE BOARD; January 28, 1980.

1. The applicant union is seeking certification with respect to a bargaining unit described as “all employees in all N.D.P. Constituency offices in the Province of Ontario”. The respondent contends that it is not the employer of the employees affected by the application.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. The Board has considered the representations of the parties on the Report of the

Labour Relations Officer dated August 24, 1979. The evidence establishes that the respondent Board of Internal Economy is a governing body of the Office of the Legislative Assembly, which in turn is the administrative office of the Government of Ontario, including such things as the Office of the Clerk, the Office of the Speaker, the Hansard Reporting Service, and personnel and finance administration. Reference may be made to *The Legislative Assembly Act*, R.S.O. 1970, c. 240, particularly sections 71-86. The Office of the Legislative Assembly implements the decisions of the Board of Internal Economy. The Board is composed of Members of the Legislature with the Speaker as chairman, and acts as the representative of the Members and transmits their wishes into actions.

4. The Board of Internal Economy allocates money from the Consolidated Revenue Fund to provide constituency offices to Members of the Legislature. These funds for the operation of each office pay for such matters as rental of accommodation, salary for staff, and postage. Maximum amounts for each use are specified, and if a Member does not spend all of the money which he is allocated, he returns it to the Central Fund.

5. Constituency office workers are interviewed and hired by each individual Member. A standard form contract is provided by the Office of the Legislative Assembly, but it is signed by the Member and the employee. The form lists "conditions of employment" which the employee and Member agree to have apply to the contract or alternatively agree not to have apply to the contract. The Member determines the number of employees, their hours of work, and vacations; he directs, disciplines, evaluates, assigns work, and fires the employees. The Member also sets the rate of pay of the employees. Although his spending from the fund is limited to the maximum amount allocated by the Board for salaries, there is no prohibition on the Member supplementing this amount from his own pocket or other sources. The Member directs the Office of the Legislative Assembly to pay his employees and the money is withdrawn from the Member's budget and a cheque is issued by the office.

6. In *York Condominium Corporation*, [1977] OLRB Rep. Oct. 647, this Board outlined a series of criteria which it has applied in determining which of two or more parties is or are the employer(s) of certain employees. The criteria are: (1) the party exercising direction and control over the employees performing the work; (2) the party bearing the burden of remuneration; (3) the party imposing the discipline; (4) the party hiring the employees; (5) the party with the authority to dismiss the employees; (6) the party who is perceived to be the employer by the employees; (7) the existence of an intention to create the relationship of employer and employee.

7. In light of these criteria, save the second, it is clear that the Member of the Legislative Assembly is the employer of any personnel that he or she hires and directs within his or her constituency office. The Board of Internal Economy is little more than a paymaster, having no contact with the employees other than in matters related to payment of the allocated funds. Although in the absence of other circumstances, the factor of payment may well constitute a cogent circumstance from which an employment relationship may be inferred, (*Municipality of Metropolitan Toronto*, 61 CLLC ¶16,214), here the weight of complete direction and control by the Member makes the mere mechanics of payment of wages insufficient in itself to establish the Board of Internal Economy as employer.

8. It is well settled that the funding and administration of wages pursuant to government programs do not of themselves cast a government body in the role of employer. A sim-

ilar situation was considered in *Waterloo County Roman Catholic Separate School Board*, [1977] OLRB Rep. December 856. There the School Board had complete direction and control of students who were paid partly out of funds provided by government assistance programs, and the Board held that the students were employees of the School Board for the purposes of *The Labour Relations Act*. The Board approved the reasoning applied to L.I.P. grants by the British Columbia Labour Relations Board in *Kelowna Centennial Museum Association*, [1977] 2 CanLRBR 285.

9. For the foregoing reasons the Board finds that the persons affected by this application are employees of the individual Members and not of the respondent. The application is therefore dismissed.

1270-79-R Ontario Nurses' Association, Applicant, v. The Regional Municipality of Durham, Respondent, v. Group of Employees, Objectors.

Practice and Procedure – Representation Vote – Employee transferring out of bargaining unit between date vote ordered and date vote held – Ineligible voter – Employee on long-term sick leave – Employment not terminated – Eligible voter

BEFORE: Rory F. Egan, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Dan Anderson for the applicant; E. T. McDermott for the respondent; no one for the objectors.*

DECISION OF THE BOARD; January 16, 1980.

1. This is an application for certification in which the Board directed the holding of a representation vote. A dispute arose as to the eligibility to vote of Lily English, Mrs. M. Ruttan and Mrs. M. Orchard. The three persons had cast ballots at the representation vote. It was directed that their ballots be segregated and not counted pending the decision of the Board as to the eligibility of each of them to vote. The Board heard evidence and the representations of the parties on the matters in dispute.

2. The Board was advised at the hearing that the parties had agreed that Mrs. Ruttan was eligible to vote and the Board so rules.

3. The evidence is that Mrs. Orchard is a registered nurse but had been employed in the capacity of nursing attendant in a bargaining unit represented by Canadian Union of Public Employees at the time when Mrs. Ruttan went on pregnancy leave. When Mrs. Ruttan left, Mrs. Orchard was promoted to the position of registered nurse to replace Mrs. Ruttan. The promotion was to have been for the duration of Mrs. Ruttan's absence but it carried on beyond that due to the illness of other RNs. Her duties as an RN commenced in March 1979. The Board is satisfied on the evidence that it was clearly understood that Mrs. Orchard was to return to the other bargaining unit.

4. The application for certification was made on October 1, 1979. The bargaining unit sought comprised all registered and graduate nurses employed by the respondent in a nursing capacity with certain exceptions not here relevant.

5. At the date of the application for certification Mrs. Orchard was working as a registered nurse as a temporary substitute for Mrs. Ruttan as we have already indicated.

6. The Board directed the holding of a representation vote in a decision dated October 25, 1979. The decision stated that "all employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote".

7. Mrs. Orchard was in the bargaining unit sought by the applicant at the date that the vote was ordered. On the date that the vote was held, however, she had returned to the other bargaining unit.

8. The applicant union takes the position that since Mrs. Orchard had not voluntarily terminated her employment and had not been discharged for cause but was still an employee of the respondent, albeit in another bargaining unit, on the date of the vote that she is an eligible voter.

9. The respondent's position is that Mrs. Orchard was not in the bargaining unit when the vote was held and therefore was ineligible to vote. In support of its position the respondent relies upon the decision of the Board in the *Canadian Westinghouse Company Limited* case, [1962] OLRB Rep. Sept. 372.

10. In the *Westinghouse* case, *supra*, the Board dealt with, among other matters, the case of a person who had been an employee in the bargaining unit on the date the vote was directed but who had been transferred out of the bargaining unit prior to the taking of the vote. In paragraph 6 of its decision the Board stated:

"The Board's standard direction for the taking of a representation vote, as quoted above, cites only two instances in which a person who was an employee in the bargaining unit on the date the vote was directed forfeits his eligibility to vote, namely, where he voluntarily terminates his employment or is discharged for cause before the date the vote is taken. The Board however, has not attempted in its standard direction to define exhaustively all of the contingencies under which a person who was an employee in the bargaining unit when the vote was directed would cease to be eligible to vote. The Board has consistently interpreted its direction to mean that a person who, between the date of the direction and the date of the vote, has ceased to be a member of the bargaining unit, is disqualified from participating in the vote, whether because of voluntary termination of employment, discharge for cause, indefinite lay-off in some circumstances, or transfer to a position out of the bargaining unit. Stated another way, the policy of the Board is that a person must be an employee in the bargaining unit both on the date the vote is directed and on the date of the taking of the vote in order to be eligible to cast a ballot."

11. We are of the opinion that the transfer of an employee out of one bargaining unit into another bargaining unit (as was the case with Mrs. Orchard) rather than into a managerial position does not provide grounds for varying the position of the Board as set out in the *Westinghouse* case and find that it is applicable in the present circumstances. In the result, therefore, we find that Mrs. Orchard was ineligible to vote.

12. We further find the submission that Mrs. Orchard's transfer back to the CUPE unit was in violation of section 70 of the Act is not supported by the evidence which clearly indicates a pre-arrangement for her return to the other unit.

13. The Board notes that the parties have agreed that Lily English, the third person in dispute, is a graduate nurse. It is the union's position that English is not an eligible voter. The respondent argues that she is an eligible voter.

14. English had been employed by the respondent for 19 years as a graduate nurse. She has been absent from work since March 14th or 15th, 1979 by reason of illness. She is unable to state when she will be able to resume working.

15. English stated that she had been informed by the respondent that her status was that of an employee on leave of absence by reason of illness and that no one had advised her that her employment had been terminated. The respondent's evidence is that no steps have been taken to terminate English's employment and that the respondent has continued to maintain fringe benefit for her. The respondent also stated that there was a job for English when she returns. She is recorded as an employee who is ill.

16. The respondent has continued to pay for English's OHIP, drug plan, eyeglasses, semi-private hospital care and extended life insurance. This is a practice which is not followed where an employee is terminated.

17. It was submitted by the applicant that the position of English was similar to that of a person on indefinite layoff since, as the evidence indicates, there is no determinable time for her return to the bargaining unit. The Board has ruled that employees who are on indefinite layoff are not eligible to vote.

18. In *Alex's Plumbing and Heating Limited*, [1970] OLRB Rep. Feb. 1321, the Board dealt with a person's right to vote at a representation vote held on January 8, 1970. The question arose because the employee concerned had been on Workmen's Compensation and absent from work since November 13, 1969. He had presented himself at the polls on the voting date.

19. The Board, in the above case, found that the employee had not terminated his employment and intended to return to work as soon as he was able. The respondent's evidence was that he had not terminated the employee and that when the doctor advised him he could return to work the respondent would employ him.

20. After reviewing the above circumstances, the Board determined that the employee was eligible to vote.

21. The foregoing case is referred to by the Board in *Canac Kitchens Ltd.*, [1978]

OLRB Rep. Aug. 723. In the latter case the Board stated that the test for eligibility in cases of absence due to illness is the continuance of the employment relationship. The Board stated, in part, in paragraph 5:

“... As stated, the test for eligibility is the continuance of the employment relationship. In this context, the Board will look to whether the person can reasonably expect to return to work upon completion of his period of convalescence. Where an ill or injured employee is given assurances from the employer that his employment remains secure, such an expectation is entirely reasonable. Where, however, as here, there is no evidence either that the employer had made a commitment to return the employee to work or that it was so obligated, the person will be found not to be an employee for voting purposes. Mr. Galante’s situation should be contrasted with the situation which existed in *Alex’s Plumbing and Heating Limited* [1970] OLRB Rep. Feb. 1321 ...”

22. In the present case the attitude and actions of the respondent and of English make it abundantly clear that the continuance of the employment relationship has been maintained. The Board accordingly finds that English was eligible to vote in the representation vote.

23. The Board therefore directs that the ballots cast by Ruttan and by English be counted. The ballot cast by Orchard is not to be counted.

24. The matter is referred to the Registrar.

1435-79-U Graphic Arts International Union, Local 12-L and Local 28-B, Complainants, v. **Rolph-Clark-Stone Packaging**, Ronalds-Federated Limited, and F.P. Publications Limited, Respondents.

Duty to Bargain in Good Faith – Employer withdrawing from joint negotiations during lengthy strike – Bargaining history indicating settlement of issues with one plant would be pattern for second plant – Employer reaching settlement but refusing to apply it to second plant – Raising issue previously settled – Whether violating section 14

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members R. D. Joyce and H. Simon

APPEARANCES: *H. Goldblatt and others for the applicants; John P. Sanderson, Q.C. and others for the respondents.*

DECISION OF E. NORRIS DAVIS, VICE-CHAIRMAN, AND BOARD MEMBER R. D. JOYCE; January 8, 1980.

1. The complainants are parties to collective agreements with the respondent, Rolph-Clark-Stone Packaging in respect to which negotiations for contract renewal have

been in progress since December 1978 and in respect to such negotiations the complainants allege contraventions of section 14 of the Act by the respondent.

2. The parties are agreed that the statements set out in the particulars filed by the complainants shall be treated as evidence before the Board, together with certain other agreed facts. Additionally some oral testimony was received.

3. The expired collective agreements in respect to which bargaining is in process were in effect from January 1, 1978 to December 31, 1978 and were entered into by the Council of Printing Industries of Canada (hereafter referred to as CPI) on behalf of Rolph-Clark-Stone Packaging (hereafter referred to as RCS) along with other employers, and covered bargaining units represented by Local 12-L and 28-B in the RCS Bramalea plant and represented by Local 555 in the RCS Montreal plant. The contraventions alleged by the complaints relate to negotiations for renewal of the collective agreements covering employees at RCS Bramalea. Central to the case before us is the structure in which negotiations were conducted. While CPI had bargained on behalf of RCS in respect to the predecessor agreements, RCS did not participate in the renewal negotiations of CPI, but instead served an individual notice to bargain on Local 12-L in respect to all expiring contracts in Quebec and Ontario, and which it stated would be "jointly negotiated separately" by the following companies:

Lawson Packaging
Reid Dominion Packaging Ltd.
Rolph-Clark-Stone Ltd.
Somerville Belkin Industries Ltd.

The other companies, none of whom had been part of the CPI negotiated agreement of 1978-79, served similar notices, but it is noted that Reid had no Quebec operations. It should also be noted that the lithographers bargaining units were represented at each company by Local 12-L in Ontario and by Local 555 in Quebec. In respect to the units covered by Local 28-B at RCS, the company, following its withdrawal from the CPI negotiations, served notice that it would bargain in respect to those units on a single company basis and they formed no part of the joint negotiation approach. It should also be noted that in the renewal negotiations of 1977 and 1978 the pattern was established of securing a settlement with Local 12-L, then followed by a settlement with Local 28-B in respect to the craft unit, then followed by a settlement with Local 28-B in respect to the other unit.

4. Following the serving of notices to bargain, events as they relate to the Local 12-L negotiations are best described as set out in paragraphs 7, 8, 9 and 10 of the particulars filed with the complaint and which read:

"7. Notice to bargain was given by R.C.S. on November 17, 1978. All four companies gave virtually identical notices to bargain and named as co-chairmen of their negotiating team Mr. T. White and Mr. F. Pamenter for Ontario and Mr. N. Bellemare and Mr. J. Matthe for Quebec. White and Pamenter were representatives of Somerville and Lawson respectively, while Bellemare and Matthe were representatives of R.C.S. and Lawson. These named individuals functioned at various times as spokesmen but the employer bargaining team was two-tiered.

The bottom tier was composed of various industrial relations officials, managers and accountants, while the senior bargaining tier was composed of the following:

T. Bastien (Reid Dominion)
D. Billing (R.C.S.)
J. Bailey (Lawson)
B. Krause (Somerville)

8. After three meetings through December, 1978 and January, 1979 wherein both the employers and the unions were unable to agree on a super-structure for joint negotiations, the unions applied for conciliation in February, 1979. The employers requested that a single conciliation officer be appointed for all companies and that conciliation meetings be held jointly.
9. In February, 1979 and March, 1979, the employers and the unions agreed to a formal structure and format for joint bargaining, the terms of which were as follows:
 - (a) one set of negotiations for Ontario and Quebec;
 - (b) a master portion of a collective agreement taken from the individual expired collective agreements covering all employers and all bargaining units was drawn up and agreed to;
 - (c) an addendum to the master portion of the document for each employer was drawn up and agreed to;
 - (d) the master and addendum referred to above were to form the basis for all future bargaining;
 - (e) all proposals submitted on behalf of the employers were binding on all the employers;
 - (f) ratification by the unions of the settlement ultimately negotiated would be as a group for all plants in Ontario and separately for each plant in Quebec in accordance with the requirements of Quebec law.
10. The above terms were agreed to by all parties and bargaining proceeded in accordance with these terms. Two addenda were agreed to for Lawson – one in respect of its plant in Quebec and another in respect of its plant in Ontario. R.C.S. and Somerville-Belkin which also had plants in both provinces had only a single addendum and the terms and conditions for all employees in Quebec and Ontario were identical for those two employers. Throughout the negotiations which followed, Lawson continually differentiated in its proposals and counter-proposals as between its Quebec and Ontario plants but R.C.S. and Somerville did not differentiate between provinces or plants at any time.”

It should also be noted that on the Union Negotiating Committee were two International Representatives, Mr. Rastin and Mr. Mailloux; also, Mr. Paquette who is International Vice President was "in and out" of negotiations in the early stages and became fully involved in them in late March and early April (following settlement of the CPI negotiations which had been conducted concurrently).

5. It should also be noted that at the bargaining sessions of March 3 and 4, 1979 the parties agreed on a master document consisting of all the clauses common to all plants and with addenda for each company or plant which reflected terms peculiar to that company or plant. Further, insofar as RCS, there were no differentiations to be made on contract clauses as between its Montreal and Bramalea plants, while in respect to Lawson's Ontario and Quebec plants the opposite was true. Also, there was a history of identical terms and conditions being applied to RCS Montreal and RCS Bramalea.

6. Conciliation was applied for in February 1979 and, at the request of the employers, a single officer was appointed in Ontario and a single officer in Quebec for all companies, and meetings alternated between the two provinces.

7. By May 2, 1979 negotiations were reaching the critical stage and the employers who had been insisting on changes in manning provisions dropped that demand "in order to avoid a strike" and it appears that the union at that time undertook to hold a meeting of its local presidents in the fall of the year to examine the general question of manning. The respondent disputes that this was a "settlement" of the issue but in any event it was then clearly removed from the discussions concerning contract renewal. However, there were other items still separating the parties which they were unable to resolve and a legal strike was commenced on May 4th. The parties agree that the key issue in the strike was the union's refusal to accede to the employer demand that shift premiums which were calculated as a percentage of basic rate should be frozen at the existing "dollar & cents" level and henceforth be expressed in flat dollar and cents terms.

8. When the strike by Local 12-L occurred on May 4th, members of Local 28-B at RCS refused to cross the picket line, and requested that RCS meet and bargain with Local 28-B in respect to its contract renewal demands. The company refused to meet and characterized the request as "ludicrous". There were some meetings between the company and Local 28-B in August and a proposal made by the company which it insisted be placed before the membership. RCS wrote a letter to all Local 28-B members on August 10th outlining the proposal it had made. On August 15th the Local 28-B membership rejected the proposal. On August 18th the company placed advertisements for help in the daily newspapers. No further meetings were held between Local 28-B and RCS until early November, subsequent to the filing of this complaint.

9. The complainants filed with the Board six letters to all employees between May 22nd and September 14th and which were above the signature of David Billing, President and Chief Executive Officer, insofar as Ontario employees were concerned and which were translated into French and went over the signature of a Montreal executive to Quebec employees. The letters in Ontario and Quebec were similar if not identical. Mr. Billing has ultimate responsibility for both the Montreal and Bramalea plants. The letters outlined the company's financial and competitive market position together with comparison of company wage rates with those of other employers and factual reports of any negotiating meetings.

Copies of the letters were sent to the union by Billing. In a May 29th letter the “main issue” was identified as being a capping of the shift premium, and a June 22nd letter refers to both shift premiums and manning as examples of change required in the industry while noting that people generally resist change. A September 14th letter reports on meetings held at the Labour Department September 12th and 13th at which the union rejected employer proposals for arbitration and further stated the employers would table a final proposal the following week. This last letter did not go to Quebec employees as according to Billing that practice had been discontinued some time in July.

10. According to the complainants a meeting was held October 11th at which were present on behalf of the union, Mr. Brown, the International President and Mr. Paquette, International Vice-President and two co-chairmen for Ontario on the management side, White and Pamentier. It must be noted that White and Pamentier “were representatives of Somerville and Lawson” and that the Quebec Co-Chairmen, Bellemare and Matthe (who were representatives of R.C.S. and Lawson) were not present. According to Billing, it was his understanding that the Chairman of Lawson had decided his company losses were such that an end to the strike had to be brought about, and that Lawson had made a direct approach to Brown in that regard, which led to the October 11th meeting. Billing also states that the position of the companies other than Lawson was that no arrangements could be made at such a meeting on their behalf. Apparently the meeting of October 11th established parameters for a settlement and it was left to the Graphic Arts International Union to lay out the draft terms of settlement to be presented to a meeting on October 15th. According to the complainants the understanding at the October 11th meeting was that whoever showed up at the October 15th meeting would be a party to the agreement. Paquette was advised on October 12th that Reid and RCS would also be at the table October 15th but not necessarily to sign the agreement and Paquette agreed to that procedure. Billing states that he and the Chief Executive Officers of the other two companies had heard the results of the October 11th meeting on October 12th and that initially the three companies other than Lawson were opposed. Subsequently and before October 15th Somerville Belkin decided to accept; Billing states that Reid’s position at that time was that they would announce their decision on October 15th. Billing states that it was put to the October 12th meeting that “Paquette said he would settle with anyone who turned up October 15th”.

11. On October 15th all employers were present when the union tabled proposals for settlement including a settlement on the shift premiums. Lawson, Somerville and Reid agreed on the settlement proposal with union modifications and remained at the meeting to work out return-to-work provisions. RCS then announced it would settle separately for its Montreal plant on the same basis as the other employers but that it would not accept the settlement for its Bramalea plant, and the only sticking point in the case of the Toronto plant was the shift premium settlement. Paquette, on behalf of the union, determined that because of Quebec law he was bound to put the offer to the RCS Montreal membership. Agreement on return-to-work provisions was arrived at in respect to Reid’s plant, Lawson’s two plants, Somerville’s two plants, and RCS Montreal plant and the strike brought to an end in those locations. Local 12-L and Local 28-B at RCS Bramalea remain on strike.

12. On October 29, 1979 the present complaint was filed with the Board, and on November 23rd additional particulars were filed which are as follows:

“1. Since the filing of the complaint in this matter with the Ontario La-

bour Relations Board, the parties have met on three occasions, namely November 6, 8 and 19, 1979.

2. The meetings took place between both Local 28-B, Local 12-L and the company since the company insisted on meeting with representatives of both bargaining units together.
3. On November 6, 1979 the company indicated that it was prepared to modify the last company proposal to Local 12-L of September 20, 1979 in order to alleviate the problem and they were prepared to agree to the night shift premium which had been agreed to with the other companies on October 15, 1979 but that they needed reduced manning.
4. The issue of manning had been raised previously at negotiations prior to the commencement of the strike but on May 2, 1979 all the employers, including RCS, had dropped their proposals on manning and had agreed to the union's proposals in that regard.
5. On November 6, 1979 the union tabled new proposals in regard to Local 28-B, including a two-year agreement, and indicated that it was prepared to sign an agreement for Local 12-L on the same terms as the RCS Montreal plant and the same terms as Somerville-Belkin, Reid Dominion and Lawson. Since November 6, 1979, the company has not responded to the Local 28-B proposals.
6. On November 8, 1979 the company suggested that the parties should disregard all previous negotiations and start afresh and, when the union inquired if, in these circumstances, the company's demand for reduced night shift premium and manning changes would still be on the table, the company indicated that they would be.
7. On November 8, 1979 the company turned down a union proposal that the term of the agreement be lengthened with an appropriate increase in the monetary package.
8. At the November 8, 1979 meeting, Mr. Billings indicated that manning was the number one priority of the company and Mr. Webb indicated that the company could get by with the same settlement as the other companies with regard to the night shift premium but they needed relief in manning.
9. On November 19, 1979 Mr. Billings indicated that the company could not wait for another time in order to get the manning relief that it needed and it could not give in to the union on this issue at this time. In order to satisfy its customers, the company could reform south of the border at New York rates and the U.S. experience was much more favourable than the Canadian but the company would rather save Ontario jobs.

10. At the November 8, 1979 meeting, Mr. Billings indicated that he had kept in touch in this matter with Frank Rolph of Ronalds Federated and George Currie of FP Publications Limited and that he had not been acting alone.

13. Mr. Billing testified that RCS Toronto continued to advertise for help from August 18th and as of October 20, 1979 the advertisements no longer earned a statement (which they previously had) that “this opportunity results from a labour dispute”. Billing explains that this statement had been initially inserted so that interested applicants could be aware of the situation and in subsequent formal letters they were advised that the jobs must be considered temporary and that they could not replace any strikers wishing to return; and that it was his understanding that the statutory right of striking employees to return did not exist after six months and consequently the company felt as of October 20th they were in a position where they could offer regular jobs. In cross-examination he denied that the change in advertising was in any way connected with dates of meetings and that it related solely to the six-month provision. Billing testified that after three and a half months strike “we had to take a decision as to whether to close or to re-open without a bargaining unit, we decided not to close down but to work. We have been manning our equipment differently. The plant is still precarious and we are not prepared to go back to excessive manning to reach a settlement”. It is noted that at the time of the hearing there were some 55 persons at work in the Toronto RCS Local 28-B units compared with some 65 pre-strike, and some 9-10 persons at work in the Local 12-L unit compared with some 35 pre-strike.

14. Billing testified that in respect to the October 15th meeting that “we turned up to enter into a settlement on behalf of our Montreal plant and to advise the Union that the Negotiating Committee no longer had a mandate for the Toronto plant”. In cross-examination Billing was asked why he had not advised the Union before October 15th and replied that he learned of the October 11th meeting on Friday, October 12th and the October 15th meeting was the following Monday.

15. Billing explained that the reasons for accepting the settlement for the Montreal plant is based on very different economic circumstances applicable to the two plants and that the “Montreal plant has a long history of high quality, high profit work and is less susceptible to the disadvantages of the contract than is Toronto”. It is noted that the Bramalea plant produces all the labelling and printing work sold throughout Canada, including through the Montreal office, and in at least one instance Bramalea produced a folding carton for Montreal; Montreal produces only folding boxes.

16. Billing stated that he considered the acceptance of the union’s proposals by the other employers for shift premium as a “capitulation” and conceded that it did not represent “a lot of money”, but that while the money did not make all that much difference, that it was indicative of failure by the union to recognize the employers’ economic problems, and that if the union was not prepared “to concede on a relatively minor issue, nothing could happen on manning”.

17. The applicant’s argument is that the respondent’s actions in removing itself at the last minute from the agreed bargaining structure with the other employers was a breach of section 14, and that the respondent’s accepting the union proposal for settlement on behalf of its Montreal plant and not its Bramalea plant was similarly a breach of section 14. The ap-

plicant relies on the *Pine Ridge District Health Unit* case [1977] OLRB Rep. Feb. 65, in which the Board notes at paragraph 24:

“No two bargaining relationships are the same and each case must depend on the particular relations between the parties at a given point in time. A web of understandings, that are both tacit and expressed, of varying degrees of definitiveness, will operate between them and will colour the quality of their actions.”

It is the applicant's contention that the agreed upon bargaining structure of March 3rd/4th, the long standing identicalness of terms and conditions at both RCS Montreal and RCS Bramalea, the conduct of current negotiations up to October 15th without differentiation by either party in respect to the two plants all constitute part of the “web of understanding” which when breached on October 15th constituted bad faith bargaining.

18. The applicant further relies on *The Grey-Owen Sound Health Unit* case [1979] OLRB Rep. July 65 as authority for the proposition that parties in a bargaining relationship cannot opt out of an agreement made respecting the structure within which bargaining will be conducted without being in contravention of section 14 of the Act. A careful reading of that case indicates that what was there in issue was not a question of “bargaining structures” with which we are here concerned but rather, a question relating to the agreement to rely on interest arbitration under section 34c of the Act rather than the more usual economic sanctions as the vehicle for final resolution of their contract dispute. It is obvious that the Board there was addressing itself to the unique facts bringing the matter under section 34c of the Act which itself requires an irrevocable agreement in writing before the section is operative. Whatever import is to be given to agreed upon bargaining structures in the instant case must be independent of the rationale in *The Grey-Owen Sound Health Unit* case.

19. The agreed upon structure of bargaining of March 3rd/4th was essentially that certain employers would bargain jointly with certain unions with the objective of concluding separate renewal collective agreements. It is clear to us that probably on October 11th and certainly on October 12th, the unions had decided that the joint bargaining structure was no longer viable and they were prepared to conclude collective agreements with any individual employers who would agree. Similarly, the events of October 11th and 12th, and preceding, clearly indicate that Lawson and perhaps other employers were prepared to abandon the joint structure and to secure a collective agreement on an individual basis. The only conclusion that can be drawn is that, in putting forward the proposal of settlement on October 15th, the union was not misled into thinking that the employer response would be a unified one. The union had crossed that bridge on October 11th when they decided that anyone coming to the meeting would be a party to the agreement and, again on October 12th, when they were informed that Reid and RCS would attend the meeting, but not necessarily to sign, and assented thereto. In any event, as was found by the Board in the *Bruce Henderson* case [1977] OLRB Rep. Aug. 485, it is not a contravention of section 14 for an employer, who has been represented by an employers' bargaining agency, to withdraw from the negotiations following a tentative settlement by notice given prior to the signing of a collective agreement on his behalf. While the Board in that case was dealing with a bargaining structure falling within the meaning of section 43(2) of the Act, the rationale in our view is equally applicable to a bargaining structure of the type before us here. We accept the language of the Board in that case where it said, at paragraphs 10 and 11:

“10. ... The freedom provided by section 43 must be integrated with the obligation imposed by section 14. Thus an employer that authorizes an employer’s organization to bargain on its behalf so as to avoid its obligation to sit down and negotiate a collective agreement with a trade union breaches its duty to bargain in good faith. Such conduct is tantamount to a refusal to recognize the status of the bargaining agent for collective bargaining purposes.

11. That is not to say, however, that every employer that gives a late notice to a trade union pursuant to section 43(2) will be found to have contravened section 14 ...”

The timing and total circumstances surrounding a withdrawal from joint negotiations will determine whether in the individual case a section 14 contravention is involved. In the instant case no inference can be drawn that the respondent was using the joint negotiations bargaining structure as a means of avoiding its obligation to bargain with the applicant and to make every reasonable effort to conclude a collective agreement. All the evidence up to early October is to the contrary, and, the respondents’ withdrawal from the joint negotiation structure was based on its evaluation that its interest would not be served by compromising on the central strike issue as the other employers were prepared to do. That does not constitute a contravention of Section 14.

20. The next question is whether the respondent was guilty of bargaining in bad faith by accepting the union’s proposal for settlement in respect to its Montreal plant and refusing to accept the same proposal in Bramalea? The applicant states that they had relied on the past history of relationships as well as the total conduct of both parties in these negotiations as establishing that any settlement reached would be in identical terms for both plants, and for the respondent at the last moment and without explanation to negate that structure is an act of bad faith.

21. There is no evidence before us that there was any discussion on October 15th as to the propriety of the respondent accepting for one plant only, beyond the statement made to us that at this time Mr. Paquette felt he was required by Quebec law to take the matter back for ratification. It seems to us that the union’s proposal for settlement, insofar as it related to RCS, was either made conditionally on settlement at both plants or made separately in respect to each plant. If it were the former, we would have expected the matter to have been the subject of discussion at that time, and we consider that, at that time, the union Negotiating Committee could have quite properly rejected the respondents’ acceptance and, if the latter, then obviously it cannot now be cause for a complaint. Nor do we consider that a long history of accepting common terms and conditions in separate bargaining units, in itself, precludes a party in the light of changing circumstances and its evaluation of how its own best interests can be served, from now taking a different position. It may well be that in a given case, the existence of a term of employment in one bargaining unit makes it more difficult for the respondent to maintain its position against importing the same term into a similar bargaining unit, but that is a matter to be hammered out in the collective bargaining forum rather than by resort to the Board’s processes.

22. The obligation to meet and bargain in good faith as required by section 14 is often fulfilled, as here, through a joint bargaining structure. Joint bargaining structures involving

multiple employers, or multiple unions are dependent on the consent of all parties involved. No legal right exists in one party or the other to insist that the opposite party in order to exercise its rights and obligations to bargain collectively under the Act must do so in concert with other entities. No doubt the cause of labour relations is often served by the adoption of such a structure but such adoption is clearly the result of the voluntary actions of the parties, and terminating such a structure is subject to the restraints outlined in *Bruce Henderson, supra*. Neither party can assume that the consent on which a joint bargaining structure has been formed irrevocably binds the parties without the most explicit terms. The withdrawal of consent by the respondent in this case may have been totally unexpected; we do not find it to have been in contravention of section 14.

23. We come now to the discussions between the parties on November 6th, 8th and 19th and in particular the respondent's position that it could probably accept the proposed settlement on shift premium if it received a concession in respect to manning. The applicant argues that previous employer proposals for manning changes had been settled or abandoned before the May 4th strike and that it is bad faith for the employer to now raise that settled issue.

24. The Board has, in a number of cases, considered the consequences flowing from a change of position by one of the parties at the bargaining table. In the *Pine Ridge Health* [1976] OLRB Rep. Feb. 65 the Board in its discussion at paragraph 25 said:

"... What then is to be made of the respondent's reneging on Article XXIII? Collective bargaining does not take place in a vacuum or in a period where time and events are frozen. Generally, as in this case, it occurs over an extended period of time against a fluid backdrop of events. A party may thus come to reshape its view of its own best interests from one point in time to another and so wish to change its position at the bargaining table. The party opposite cannot be taken to be unaware of the increasing likelihood of that happening with the passing of each successive day and week. The old caution, 'Take it before I change my mind' reflects a widely accepted bargaining precept that has its proper application in collective bargaining and in our view, is applicable in the instant case."

and in the *Toronto Jewellers Manufacturing Association* case [1979] OLRB Rep. July 719 at paragraph 10 where it was said:

"... Having regard to the Board's comments in *Pine Ridge, supra*, about the collective bargaining process, it would be naive in the extreme for parties to collective bargaining to expect that conditions which prevailed before a strike or lockout to still prevail afterward. That is not to say that both parties might not see it to be in their best interests to agree to pick up bargaining where they left off before a strike or lockout; rather it is to say that neither party is entitled to rely on that being the situation. ..."

25. In the instant case, the respondent is under the obligation to bargain and make every reasonable effort to conclude a collective agreement despite the continuance of the

strike, and in so doing the respondent is not entitled to ignore completely the bargaining which has gone before. We are somewhat concerned by the statement in the applicant's particulars to the effect that:

"On November 8, 1979 the company suggested that the parties should disregard all previous negotiations and start afresh and when the Union inquired if, in these circumstances, the company's demand for reduced night shift premium and manning changes would still be on the table, the company indicated they would be."

This statement in the context of oral evidence given by Billing is interpreted as primarily resurrecting the previous manning issue and not obviating all previous negotiations. Were we to come to a different interpretative conclusion our evaluation of the respondents' conduct would also be different. In our view, following six months of strike and the dissolution of the joint bargaining structure, the employer, in the language of the *Wellington-Dufferin Health Unit* case, Board file 0786-79-U (as yet unreported) "is entitled to re-appraise and reformulate its earlier position – provided it is acting *bona fide* and is not injecting items at the 'eleventh hour' as a means of avoiding agreement".

26. We do not believe in the total circumstances that the respondent is bent on a course of frustrating negotiations and making conclusion of a collective agreement impossible. The fact that the respondent was prepared to forego immediate manning changes in favour of future discussions in order to avoid a strike, and more importantly was prepared to stand by that decision in order to end the strike in Montreal, does not preclude him endeavouring to bargain further to achieve such change at Bramalea. This position reflects the respondents' difference in assessment of economic impact on it of such a settlement, and its viewed bargaining strength as between the two locations. Where economic sanctions are invoked to resolve disputes, neither party is entitled to assume that the cost of such sanctions may not, in some way, influence the bargaining position of both parties in their efforts to arrive at a bargain most closely resembling their original bargaining position. That is hard, but not bad faith, bargaining.

27. We turn now to the negotiations with Local 28-B which were not a part of the joint negotiations.

28. The meetings of November 6, 18 and 19, 1979 included representatives of Local 28-B "since the company insisted on meeting with representatives of both bargaining units together". At the November 6th meeting the union tabled new proposals including a two year agreement and "since November 6th 1979 the company has not responded to the Local 28-B proposals".

29. The evidence establishes that there has been a long standing history of both parties awaiting the establishment of a pattern-settlement between the company and Local 12-L before pursuing negotiations to a conclusion with Local 28-B. At meetings in April under the auspices of a mediator the company did make an offer for settlement which included for the first time a proposal to increase the work week from 35 hours to 40 hours. This offer was rejected by the membership on April 27, 1979.

30. It would also appear that following the strike by Local 28-B on May 9, 1979 that at

some stage the parties held discussions with the company making a total proposal for settlement in respect to Local 28-B despite no settlement at that time with Local 12-L. That proposal was carried to the membership, without recommendation, on August 15th and rejected.

31. The respondent, through Billing, stated that its reason for insisting on both unions being represented at the November meetings was because of the history of pattern bargaining and because throughout the current set of negotiations both Local 12-L and 28-B made any proposal for settlement for one local conditional upon settlement with the other local.

32. Where there is a history of pattern bargaining it is usual and proper for the parties to take into consideration the status of such development in making their proposals. No doubt there are occasions when the parties will not be in complete agreement as to the weight or relevance of these outside events, and that in itself fortifies the need to engage in rational discussions. For that reason we find the respondent's response to Local 28-B's request of May 4th to meet and negotiate, as a clear refusal to fulfill its section 14 obligations.

33. As to the events of November, Local 28-B appears to have acquiesced in the company's demand for it to negotiate jointly with Local 12-L and we do not therefore find any contravention arising out of that circumstance. However, Local 28-B's acquiescence to that bargaining structure obviously did not extend to agreement to suspend its negotiations to make a renewal collective agreement. The respondent by its conduct in the November meetings in which it confined itself solely to a discussion of the dispute with Local 12-L and had failed completely, as of the time of our hearing, to respond in any manner to the new proposals of settlement put forward by Local 28-B, justifies the inference that the respondent had no intention of engaging in rational discussions with a view to concluding a collective agreement with Local 28-B unless and until it concludes negotiations with Local 12-L. The respondent is not entitled to unilaterally make such a pre-condition to fulfilling its section 14 obligations, and its refusal to engage in examination and discussions of Local 28-B's proposals is tantamount to refusing to recognize Local 28-B as bargaining agent.

34. Despite the recognized difficulties this Board finds that the collective bargaining relationship will best be served by a declaration and a direction that will correct any misconceptions that either party may have had in respect to the underlying need for a consensual base on which to found joint negotiations and/or sequencing of settlements pertaining to individual bargaining units.

35. The Board orders the respondent to meet with the complainant Local 28-B and endeavour by a process of bargaining consistent with this decision, to bargain in good faith and make every reasonable effort to make a collective agreement.

36. The Board further directs that the parties request the services of a mediator in order to assist them in achieving a collective agreement.

DECISION OF BOARD MEMBER H. SIMON:

1. I agree with the majority decision with regard to Local 28-B but I have some serious reservations with the decision with regard to Local 12-L. In my view the company is guilty of bargaining in bad faith with Local 28-B as well as with Local 12-L.

2. The company agreed to joint bargaining. They accepted the rules set out to govern the negotiations. For the company to renege on the agreement at the last moment is an act of bad faith not only to its employees and their union but also the other employers who have accepted the term of the negotiated settlement.
 3. There has been a history of 25 years of joint negotiations between the Toronto and Montreal locals of the same union with this company. The agreements have always been identical.
 4. At no time prior to October 15th has there been any indication by the company that they would require different conditions for the plant in Bramalea than agreed to for the Montreal plant.
 5. It is admitted that the difference in cost as far as shift premiums were concerned was very small. It appears that the company was more interested in breaking up the joint negotiations than in settling the contract for all its locations.
 6. There is undisputed evidence that the manning issue had been settled prior to the strike. The one and only dispute during the strike was shift premiums. It was on that issue that Mr. Billing accused the other companies of "capitulation", although he accepted the same terms for the Montreal plant.
 7. For the company to now resurrect the manning issue is to throw road blocks in the way of settlement. The company must know that it would be impossible for the union to concede to this demand, having settled with the rest of the industry without changes in the manning provisions.
 8. Collective bargaining is not carried on in a jungle. An agreement reached on any one issue in dispute must be honoured, otherwise the parties would never finalize negotiations for a contract.
 9. The analogy with the *Toronto Jewellers Manufacturing* case is not valid here. In that particular situation the employers had made a contract offer to the union, the offer was rejected by the union. Several weeks later the union was prepared to accept the same offer which the employers had withdrawn in the meantime. In the case before us the employer requested changes in manning and later withdrew their request. Now 6 months later the respondent is renewing the request for changes in manning for its Bramalea plant. This is tantamount to the union requesting changes in the wage settlement or any other item agreed to prior to the strike.
 10. I must therefore conclude that the company is determined to frustrate the negotiations and make it impossible to conclude a collective agreement for the Bramalea plant.
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0948-79-U David Sharpe, Complainant, v. Service Employees International Union, Local 204, Respondent, v. **Royal Ontario Museum**, Intervener.

Duty of Fair Representation – Part-time employees seeking inclusion of specific provisions in agreement – Bargaining committee failing or refusing to obtain provisions during negotiations – Majority of bargaining unit accepting proposals – Part-time employees alleging arbitrary conduct – Union balancing competing interests and sacrificing part-timers demands – No breach of section 60

BEFORE: N. B. Satterfield, Vice-Chairman

APPEARANCES: David Sharpe, Peter Maguire and George Ghent for the complainant; Michael Mitchell, Eric Tucker and Joe Jordan for the respondent; J. H. Harvey for the intervenor.

DECISION OF THE BOARD; January 4, 1980.

1. The Royal Ontario Museum ("the employer") was represented at the hearings and made a party thereto.
2. This is a complaint alleging that the respondent trade union has contravened section 60 of *The Labour Relations Act* which imposes a duty of fair representation on trade unions. It provides as follows:

"A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be."

The complainant contends that the respondent, through its agents Joe Jordan and Alan Selman, has breached section 60 by acting in an arbitrary and bad faith manner in its representation of the complainant and the grievors named in the complaint. Jordan is business agent of the respondent and Selman is chief steward and was chairman of the respondent's negotiating committee which bargained with the employer on behalf of the complainant and the grievors. The complainant is alleging that the way in which the negotiating committee (and in particular Jordan and Selman) dealt with a proposal for collective bargaining made by part-time employees to protect them from compulsory shift assignments constitutes a breach of section 60 of the Act.

3. More particularly, the complainant contends that he and the grievors were dealt with in an arbitrary and bad faith manner as a result of the following acts, omissions and failures of the respondent and its agents:

- (a) The failure of the negotiating committee to include in its bargaining proposals to the employer the protection against compulsory shifts sought by the part-time employees.
- (b) Acceptance by the negotiating committee of a proposal from the

employer which introduced the compulsory shift assignments from which the part-time employees were seeking protection.

- (c) Conduct by Jordan and Selman of ratification meetings in a way which frustrated discussion of the offending agreement language and attempts by the complainant and the grievors to have that language removed from the terms of settlement.

4. The evidence of the complainant's and respondent's witnesses reveal differences and contradictions on some key points. The facts set out herein reflect the Board's assessment of that evidence, the reliability of the witnesses' recollection of events, their demeanor and relative credibility. The respondent has approximately 10,000 members in a diversity of bargaining units. This complaint concerns members of the respondent who are employed in the employer's support services and comprise a bargaining unit of some 56 employees known as the Royal Ontario Museum service group. This complaint is brought on behalf of five of these members, including the complainant and the events leading up to it are as follows.

5. The events giving rise to this complaint begin with the respondent's preparations for negotiating the renewal of a collective agreement with the employer on behalf of the service group and ends with the ratification of a collective agreement to be effective January 1, 1979 to June 30, 1980. In preparation for negotiations, the respondent held two meetings late in 1978, at the first of which a negotiating committee was elected, proposals for amending the collective agreement were put forward to the members and additional proposals obtained from members at the meeting. A written statement of these proposals were brought back to the members at the second meeting and eventually approved by a vote of the members. It was at one of these meetings that the part-time employees advanced a proposal for a condition in the agreement which would protect them from being compelled to take over the shifts of absent full-time employees. While the evidence of the several witnesses who testified is equivocal as to which meeting this occurred, on balance, the Board concludes that it was at the first meeting and, after modifications were made to the original proposal it was approved. The document in evidence before the Board which is purported to be a copy of the proposals approved by the members attending the second meeting, however, does not contain any reference to the protection being sought by the part-time employees.

6. The negotiating committee began bargaining with the employer and by mid-May 1979 was dissatisfied with progress of the negotiations. On May 23rd it held a meeting of the employees at which an interim report was made. By this time the committee had agreed to a proposal from management which is seen by the grievors as compelling part-time security officers to replace absent full-time officers, which of course runs counter to the protection which they were seeking. The information given to the employees at this meeting was of a general nature indicating that some progress was being made on non-monetary issues but not on monetary ones. No information was given on details of any of the resolved issues.

7. Another meeting of the employees was held June 20, 1979 at which a settlement offer from the employer was put before them. They voted to reject the offer on the advice of the negotiating committee, following which a strike vote was taken but the required plurality was not attained. The evidence indicates that this was a rather boisterous and sometimes chaotic meeting, however, a concise, written summary of the settlement offer was given to

the employees and explanations and clarification of its contents were given before the vote was taken. The summary included the language, identified as Article 13.02, which required the part-time security officers to substitute for absent, full-time officers. This was the first indication which the part-time employees had of this provision and part-time employees attending the meeting spoke in opposition to the change. Bargaining resumed and on July 10 the parties signed a memorandum of settlement which confirmed all other issues previously agreed between the parties, including Article 13.02 and contained monetary improvements to the prior offer. The terms of settlement contained also the undertaking of the negotiating committee to recommend acceptance of the terms by the employees, which it did and the settlement was ratified by secret ballots taken at meetings held on July 12th for this purpose.

8. Following the June 20th meeting, two of the grievors took up separate petitions in an attempt to influence the respondent to change its position on Article 13.02. The object of one petition was to get the negotiating committee to call another meeting of the employees before July 1st to report on progress of negotiations. This petition was given to Jordan on or about June 26th, but no meeting resulted. The second petition was a demand of the signatories that the negotiating committee replace Article 13.02 by the protections which the part-time employees had originally sought. This petition was presented to Selman on or about July 8th and he in turn gave it to Jordan. There is no evidence that the negotiating committee considered either petition, but, if it did, neither petition attained the results which their sponsors were after.

9. The negotiating committee held two ratification meetings on July 12th in order to accommodate the shift arrangements of the employees. One was held in the morning and the other at night. Both meetings were run on the same format. Employees were given a summary of the changes to the collective agreement which had been agreed by the negotiating parties. A motion was made and seconded that the negotiating committee's recommendation to accept the settlement terms be approved. After this the employees had an opportunity to discuss and clarify terms of the settlement before a vote on the motion was taken. After the morning ballot, the boxes were sealed until the second meeting and all votes were counted after the second ballot was completed. Although these meetings were not without disruption and there is evidence of disagreements between the grievors who were in attendance and the chairman, Selman, at both meetings, they were by design of the negotiating committee more orderly than the June 20th meeting.

10. The complainant contends that the negotiating committee first having not only failed to put forward to the employer the proposal of the part-time employees but having agreed to the employer's proposal which was contradictory of the protection which the part-time employees were seeking, then conducted, either by intent or out of ineptitude, the June 20th and July 12th meetings in such a manner as to frustrate all efforts of the grievors to protect their interests. The complainant alleges that the lack of response to the two petitions was part of the same scheme to frustrate the wishes of the part-time employees, as was the failure of Selman to follow Robert's Rules of Order in his conduct of the July 12th meetings. The complainant claims that the respondent's own constitution and by-laws require it to conduct its meetings in accordance with Robert's Rules. It is these failures and acts of the respondent's agents which the complainant contends constitute acting in an arbitrary and bad faith manner in representing the grievors.

11. The evidence demonstrates that the negotiating committee has executed its re-

sponsibility to represent the respondent's members in collective bargaining in a manner consistent with the norms of the organized work force in this province. It has been elected by the respondent's members, obtained a mandate in the form of proposals for changes in terms of the collective agreement for which it was to bargain, reported back to the membership when it needed further instructions and eventually brought back terms which the employees approved in secret ballots. In this context, has the negotiating committee's failure to include in its proposals to the employer the protection sought by the part-time employees, and its acceptance of the employer's contrary proposal taken together with its conduct towards the grievors after the June 20th meeting, resulted in a breach by the respondent of its section 60 duty to fairly represent the grievors in their relationships with the employer? That is the issue the Board must decide.

12. The evidence does not reveal whether the negotiating committee's failure to include the part-time employees' protective language in the bargaining proposals was an act of omission or commission. In either event, the Board has stated consistently that section 60 is not designed to guard against error by oversight, carelessness or even negligence as long as the error itself does not demonstrate a "not caring" attitude or an improper motive indicative of or consistent with arbitrary, discriminatory or bad faith representation. In this case there is no evidence which conveys a not caring attitude on the part of the respondent's agents and none of any improper motive towards the grievors. Thus, whether their proposal was deliberately or accidentally omitted from the final proposals, there is no evidence to support a conclusion that the omission constitutes a breach of section 60.

13. In respect of the committee's acceptance of Article 13.02, the employer's proposal, one of the complainant's witnesses who was a member of the negotiating committee testified that the decision to accept it resulted from the interests of the full-time employees winning out over those of the part-time employees in the committee's evaluation of these competing interests. In doing so, the committee was meeting one of the responsibilities that fall commonly to bargaining agents, particularly in negotiations. The process itself is one of trade-offs between the parties and, for the trade union, it also involves an internal balancing of interests between individuals, minority factions and majority factions in order to arrive at what it believes is the best bargain it can achieve for the collective group. Section 60 is an attempt to protect individuals or sub-groups within the collective group from being abused by the bargaining agent in carrying out its role in the process. The section does not so much protect individuals and sub-groups from being adversely affected by the process as it is an attempt to protect them against arbitrariness, discrimination or bad faith on the part of the bargaining agent when it considers or fails to consider the competing positions of individuals and sub-groups. On the evidence, the Board is satisfied that the negotiating committee did weigh the competing interests of full-time and part-time employees in making its decision to accept Article 13.02 and there is no evidence of the committee members acting in an arbitrary or bad faith manner in doing so.

14. Turning now to the allegation that the handling by Jordan and Selman of the June 20th meeting, their apparent ignoring of the petitions and their conduct of the two meetings on July 12th constituted a breach of the respondent's section 60 duty because it frustrated the grievors' attempts to protect their interests, the Board finds no substance in this allegation. The negotiating committee's mandate for the negotiations came from the members. At the June 20th meeting, it was made clear by the members that the committee was to meet its mandate without the authority to call a strike, but there is no evidence of any other change

in it. There was no obligation on the committee to call another membership meeting until it needed further instruction from the members; this is the uncontested evidence of Jordan. Therefore, while the committee's apparent ignoring of the petition for a meeting may appear to the Board or any other outside observer to be politically unwise, it is reasonable to infer from the acceptance by the members of the ultimate settlement, that the committee was acting in the best interests of all employees as a group in so doing. The second petition was delivered while the committee was in the process of negotiating the memorandum of settlement, which scarcely put it in a position where it could have acceded to the demand of the petitioners. To do so might have exposed the committee to a claim from the employer that the committee had failed to bargain in good faith. Insofar as the conduct of the meeting on June 20th and the two meetings on July 12th is concerned, the Board, having read the relevant articles of the respondent's constitution and by-laws as well as those of its parent organization, accepts the respondent's assessment that they do not require the negotiating committee to follow Robert's Rules in conducting the type of meetings in question. Quite apart from that consideration, the evidence indicates to the Board that, within the reality of conventional collective bargaining, the employees in attendance at these meetings were given a reasonable opportunity to obtain clarifications and explanations of the settlement terms and to speak to any issues attached thereto before deciding in secret ballots to accept or reject the proposed settlement.

15. For all these reasons the complaint is dismissed.

1730-78-M Office and Professional Employees International Union, Local 166, Trade Union, v. **Spruce Falls Power & Paper Co. Ltd.**, Kimberly-Clark of Canada Ltd., Employer.

Employee – Cost Analysts and Financial Analysts having access to projected wage increases and other costing data relevant to collective bargaining – Employed in confidential capacity

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members W. G. Donnelly and D. B. Archer.

APPEARANCES: *Jeffrey Sack, Jeffrey Egner, Gilles Beauregard and Roland Clouthier for the trade union; Wallace M. Kenny for the employer.*

DECISION OF VICE-CHAIRMAN PAMELA C. PICHER AND BOARD MEMBER W. G. DONNELLY; January 2, 1980.

1. This is an application under section 95(2) of *The Labour Relations Act*. The trade union has requested the Labour Relations Board to determine whether or not certain persons heretofore excluded from the bargaining unit are employees for the purposes of *The Labour Relations Act*. The classifications in question are the Woodland's Cost Analysts, the Mill Cost Analysts the Senior Mill Cost Analyst and the Financial Analysts. The respondent contends that none of the persons occupying the classifications in question are employees for the purposes of the Act because they all either are employed in a confidential capacity in

matters relating to labour relations or exercise managerial functions and would, therefore, be excluded from collective bargaining pursuant to the provisions of section 1(3)(b) of the Act which are as follows:

“1. (3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

2. Persons employed in a confidential capacity in matters relating to labour relations are excluded from collective bargaining because their involvement with confidential information relating to the employer's labour relations would, if they were permitted to engage in collective bargaining, place them in a conflict of interest between their responsibilities to the company in performing their job functions and their interests as members of the bargaining unit. Optimal collective bargaining flows from an arms-length relationship between the union and members of the bargaining unit on the one hand and management on the other. The placement of persons who are employed in a confidential capacity in matters relating to labour relations outside the bargaining unit recognizes the divergence between the interests, objectives and priorities of the two groups and is aimed at maintaining the vital arms-length relationship between unions and management which forms the foundation of effective labour relations.

3. In defining the parameters of the confidential exclusion the Board has consistently held that for a person to be excluded from collective bargaining on the basis of being employed in a confidential capacity there must be “a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer ...” (see *Falconbridge Nickel Mines Limited*, [1966] OLRB Rep. Sept. 379 at page 388). As further indicated in *Falconbridge*, “an accidental or isolated involvement in some aspect of labour relations is not sufficient ... to exclude a person from collective bargaining.” To cause a conflict of interest sufficient to exclude a person from collective bargaining the exposure to confidential information must flow from an individual's regular duties and constitute an integral part of the employee's service to the employer's undertaking (see *York University*, [1974] OLRB Rep. Dec. 945 at page 951 and the cases cited therein). The kind of information deemed confidential within the meaning of section 1(3)(b) of the Act is not simply information that the employer would rather the employees did not know about. Instead it is information relating to labour relations which is confidential because its disclosure would prejudice the employer in the sphere of labour relations such as in negotiating or settling grievances (see *Comtech Group Limited*, [1974] OLRB Rep. May 291; *Frito-Lay Canada Limited*, [1978] OLRB Rep. Sept. 831 and *Falconbridge*, *supra*).

4. Mr. Ron Briggs is the respondent's Woodland's Cost Analyst. Briggs estimates that he spends about forty per cent of his time supervising eight to ten camp clerks. Included among his other duties is the task of preparing the costing necessary for compiling five-year forecast plans relating to what the company proposes to do over the course of the ensuing five years. The evidence indicates that Briggs also takes part in putting together the yearly Woodland's operating budget. Of particular significance is Briggs' participation at the be-

hest of management in labour negotiations with the union. During negotiations he is asked by top-level management to provide cost estimates relating to how much a proposed increase might cost the company over a period of time. He testified that he is given the union's proposal, asked to determine how much it would cost the company and determine if there would be a more advantageous way to make the payment. This kind of evaluation would require him, for example, to cost a bonus payment versus a cost of living allowance versus a total cost per cord of productivity which is paid to the employees. Briggs testified that he has taken part in negotiations in this manner every year since he assumed his position as Woodland's Cost Analyst in 1975.

5. Briggs' regular participation in labour negotiations supplying management with cost data necessary to evaluate the union's proposal and prepare their response thereto clearly constitutes confidential labour relations work. Costing proposals and alternative responses generates information the untimely revelation of which could severely prejudice the employer's position in negotiations. The employer must know that the individual it calls on to supply cost information relating to the various proposals is completely devoid of a conflict of interest. The Board, therefore, finds that Briggs is employed in a confidential capacity in matters relating to labour relations and is not, therefore, an employee for the purposes of the Act.

6. The employer further contends that the Mill Cost Analysts are employed in a confidential capacity in matters relating to labour relations. The aspect of the Mill Cost Analysts' job that the employer contends is confidential relates to their participation in making up the cost-of-manufacturing section of the budget. The Mill Cost Analysts' work in preparing the operating budget begins sometime in May each year and is finished sometime in September. Because none of the three persons who occupied the position of Mill Cost Analyst at the time of the application had completely performed the duties relating to the budget, the respondent called evidence from other persons who have since been promoted. Mr. Cassidy, for example, was a Mill Cost Analyst for one and one-half years before he was promoted to Mill Cost Accountant; Mr. Peter Pecaric was a Mill Cost Analyst before he became the Senior Mill Cost Analyst and Mr. Reno Clouthier was a Mill Cost Analyst before becoming the Woodland's Assistant Cost Accountant. There is general agreement that the duties relating to the preparation of the budget have not changed since the above-named individuals occupied the position of Mill Cost Analyst and the Board therefore relies on their testimony as well as that of Claude Devost, a Mill Cost Analyst at the time of the instant application, in evaluating the duties and responsibilities of the Mill Cost Analysts.

7. Mr. M. R. Hicks, the comptroller for Spruce Falls in charge of the Mill Cost Accounting Department, testified that once a year the company budgets for a projected five years. In developing the budget the Mill Cost Analysts create cost standards or projections of what the cost of production in the various departments will be for the following year. In developing the standards or projections the Mill Cost Analysts use historical data which is then updated by their formation of projections for the following year. Being responsible for predicting the cost of manufacturing for the various departments for the following year, they must be informed of changes that either will or may take place in these departments over the ensuing year. To this end they hold meetings with the superintendents of the various departments to find out whether changes are anticipated for that department for the following year. The evidence indicates, for example, that they are regularly informed of anticipated or proposed manpower alterations because of the impact of such changes on their cost

projections. We note in this regard the testimony of Mr. Cassidy, the Mill Cost Accountant in charge of the Mill Cost Department, that labour costs constitute the major part of the budget. Among numerous other examples of the kind of information to which they become privy, Mr. Reno Clouthier testified that in performing his duties as Mill Cost Analyst he was informed in his meeting with the head maintenance engineer that the department intended a manpower increase of one maintenance engineer and that other employees would be switched around. No one in the bargaining unit knew of the proposed increase at the time he was informed.

8. In addition to learning about proposed changes in departments and proposed alterations to manpower levels before those proposals are finalized or publicized, the Mill Cost Analysts are also provided with the proposed labour rate increase for the following year in order to set their projections for the budget. Mr. Hicks testified that the forecasted labour rate provided to the Mill Cost Analysts is the best projection of what the company thinks the wage settlement will be for the upcoming year. Having regard to all of the evidence, the Board is satisfied that the projected labour rate used by the Mill Cost Analysts in preparing their budget is not just an across-the-board percentage increase reflecting a notional increase in the cost of living, but is, in fact, top management's best estimate of the labour rates they will have to pay in the ensuing year. The projected labour rate increases are kept in Mr. Cassidy's desk under lock and key. They are made available to the Mill Cost Analysts, but not to anyone in the bargaining unit. The testimony reveals that when the operating budget is completed and distributed to other people, some of whom are in the bargaining unit, all the labour rate increases are lumped together and put under one account called a standards adjustment. In this form members of the bargaining unit such as Mr. Roland Clouthier do not become privy to the projected labour rate increases in performing their cost work.

9. Counsel for the Union argued that because the company has developed a means of concealing the proposed labour rate increases by lumping them into one standards adjustment figure, the Mill Cost Analysts need not have access to the actual proposed labour rate increases. The evidence clearly indicates, however, that the regular duties of the Mill Cost Analysts require them to be privy to the actual anticipated labour rate increases. As they are the persons who in fact set the standards for the budget, the Board is satisfied that they could not perform their work adequately with one lump figure.

10. The confidentiality of the proposed labour rate increase was brought home by Mr. Hicks' testimony when he stated that on August 25, 1978, the dead line to produce a set of cost standards for the 1979 budget, the company had not yet concluded a collective agreement and senior management had to provide the Mill Cost Department with a projection of what they thought the wage rate settlement would be. Persons who receive this kind of information in the regular course of their duties would be in a conflict of interest position if they were in the bargaining unit. If the union were privy to the information of the company's own evaluation of what the wage rate settlement would be, the company's position at the bargaining table would be severely compromised. The Mill Cost Analysts' access to this confidential information is neither incidental nor accidental. It is an essential ingredient in the performance of their budgeting duties which span approximately four months of the year. The fact that this information is but one of the numerous factors they use in forming their projections does not diminish its importance or render it incidental.

11. We note that in a recent decision, *St. Clair College of Applied Arts and Technology* (File No. 1612-78-M, decision dated November 20, 1979, as yet unreported), the Board made a similar finding by excluding a woman who in the regular course of her duties was given, prior to its being generally known, what the Board concluded to be the employer's actual estimate of the salary increases for the upcoming year.

12. For the reasons set out above, therefore, the Board finds that the Mill Cost Analysts are employed in a confidential capacity in matters relating to labour relations and are not employees for the purposes of the Act.

13. Mr. Peter Pecaric is the Senior Mill Cost Analyst who supervises the work of the Mill Cost Analysts and Statistical Clerks and reports to Mr. Cassidy, the Mill Cost Accountant. On the basis of the evidence the Board is satisfied that Mr. Pecaric, like the Mill Cost Analysts he supervises, has regular access to the forecasted labour rate in the performance of his duties and is, therefore, not an employee for the purposes of the Act for the same reasons we have so found for the Mill Cost Analysts. We note in addition that, similar to the Mill Cost Analysts, Mr. Pecaric testified about circumstances where he would have advanced knowledge of planned or potential lay-offs before a final decision had been made or publicized. Pecaric testified that the cost analysts are constantly doing special studies for superintendents of departments and as such become privy to projected changes in the labour force. In the Board's view, the regular access to information of this nature prior to its being finalized or publicized constitutes regular material involvement in matters relating to labour relations which are confidential because their untimely disclosure would prejudice the interest of management in its collective bargaining relationship.

14. Accordingly, for the reasons given above, the Board finds that Mr. Pecaric is employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Act and is, therefore, not an employee for the purposes of the Act.

15. Mr. Dean Davies is one of two Financial Analysts. He reports to Mr. David Linton, the Manager of Business Planning in the Woodland's Operation. Mr. Linton testified that the business planning function in which the Financial Analysts are involved encompasses two areas: firstly, looking at plans for the direction of the company from both a long and short-term perspective, such as whether the company should be expanding its interest in the newsprint business or whether it should be emphasizing the lumber aspect of its operation. The second area of concern is an evaluation of the use of any given resource for the company and would involve looking at such things as whether the company should alter its use of the labour force or its wood resources.

16. The Financial Analysts estimate the cost of the various alternatives being considered in these areas and gather the information necessary to perform their evaluation. They deliver to top management a set of conclusions based on their analysis and make a recommendation concerning which direction they feel the company should take. Mr. Linton testified that in the course of costing these alternatives, the financial analysts would work with projected labour rate increases. Mr. Linton emphasized the importance of the labour dollar as a component of the cost of their product and stated that the labour rate forecast was "extremely close to the best type information." A few years ago the Financial Analysts worked extensively on alternatives relating to the proposed shutdown of the market pulp business. In costing alternatives, Mr. Linton stated that Financial Analysts would spend approxi-

mately fifteen per cent of their time using labour rate extension factors. He testified that the alternatives costed by the Financial Analysts would reveal the necessity for transferring people from one aspect of the operation to another or for reducing manpower. In setting out the alternatives related to the shutdown of the market pulp business, for example, the Financial Analysts listed the impact of the alternatives on various things, personnel level being one. He emphasized that any proposed reduction in cords to be cut off the woodlands would have a direct impact on the number of persons employed. With respect to the sulphide operation, for example, Mr. Linton testified that the proposals contained a twelve to thirteen per cent reduction in wood cordage which he indicated would have a very significant impact on the manpower level.

17. The evidence establishes that in the regular course of their duties, the Financial Analysts are required to use the projected labour rate increase. For the reasons set out above, the Board has found that a person's regular use of this figure establishes in the circumstances of this case that he is employed in a confidential capacity in matters relating to labour relations. Additionally, the Financial Analysts cost alternative directions for the company and alternative use of resources (including the resource of labour) and then make recommendations as to which alternative the company should adopt. The alternative proposals costed by financial analysts could involve the transfer of employees, the reduction of the work force or the closure of a segment of the business. The Financial Analysts are, therefore, aware of sensitive labour relations possibilities before final decisions are made and before such information is publicized. In this manner, the financial analysts become privy to information which if divulged in an untimely fashion could prejudice the employer in its labour relations. For this reason, therefore, as well as for their regular use of the projected labour rate increase, the Board concludes that the Financial Analysts are employed in a confidential capacity in matters relating to labour relations.

18. In summary, the Board finds that all of the persons occupying the classifications in dispute (The Woodland's Cost Analyst, the Mill Cost Analysts, the Senior Mill Cost Analyst and the Financial Analysts) are employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Act and are, therefore, not employees for the purposes of the Act. In view of the Board's finding with respect to confidential capacity it is unnecessary to determine whether any of the individuals in question exercise managerial functions.

DECISION OF BOARD MEMBER D. B. ARCHER:

1. I dissent from the majority decision with the exception of Woodlands Cost Analyst who supervises ten camp clerks and can be excluded because he exercises managerial functions.

2. As regard to the others, "Mill Cost Analysts, Financial Analysts and Senior Cost Analysts" I would have found that they do not exercise sufficient managerial authority to exclude them from union membership, nor do they have authority to make any decision with regard to the confidential information to which they have knowledge. I come to this conclusion because I do not believe the evidence proves that they either exercise independent judgment with regard to the confidential information, they merely relay it on to a management negotiating team to use in their deliberations. Much of the same information must be disclosed to the union in order to carry on meaningful negotiations. These are white collar officer workers, their knowledge is gained as a result of acting in their professional capacity.

3. I have agreed that Mr. Briggs does supervise employees and should be excluded on that ground. The fact that some of these employees are aware of the cost of labour doesn't seem to me to be particularly important. A financial analyst or a capable accountant could estimate how much a certain union demand would cost. Before such a person was excluded I believe a further step is necessary. The person must exercise judgment as to whether or how the demand should be met. These persons do not exercise this type of authority.

4. I would have found that the duties they performed did not exclude them from the bargaining unit.

0936-79-R Local 663 of the Service Employees International Union, A.F. of L., C.I.O., C.L.C., Applicant, v. **Trenton Memorial Hospital**, Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Certification – Whether employees full or part-time – Seven weeks rule considered

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

***APPEARANCES:** M. Mitchell and others for the applicant; Brian Burkett and others for the respondent; G. Sylvia Serres, Naydene M. Baldree, Grace Ingle and Margaret Ellicott for the objectors.*

DECISION OF THE BOARD; January 24, 1980.

1. This is an application for certification.

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3. The applicant seeks bargaining rights for a unit of full-time office and clerical employees in the respondent's hospital. A number of issues arose respecting the composition of the bargaining unit. The Board therefore authorized a field officer to inquire and report to the Board on the list and composition of the bargaining unit. A hearing was convened to hear the representation of the parties on the content of the report.

4. There are three issues outstanding. The first issue is the method which the Board should use to designate full-time and part-time employees for the purposes of the application. The second question is the status of Mrs. Carol Glover, described by her employer as being a technologist and by the union as being a clerical employee. The third issue is the status of Ms. D. Dafoe and Mrs. C. S. Scott, bookkeepers whom the applicant submits should be excluded from the bargaining unit by virtue of the managerial and confidential nature of their employment in respect of labour relations.

5. The applicant submits that in the special circumstances of this case the Board

should depart from its normal practice in determining which employees are full-time. Generally the Board looks to the period of seven weeks immediately prior to the date of application as a representative period in which to assess the number of hours worked by employees. If during the four or more of the seven weeks examined a person works for more than 24 hours per week the employee falls within a bargaining unit of full-time employees. The seven weeks guideline is, of course, a procedural construct, arising from the Board's experience, adopted in certification proceedings to facilitate and give some predictability to resolving the list of employees in the full-time and part-time bargaining units. By adopting this practice the Board has sought to make it easier for the parties appearing before it to reach their own agreement on the status of employees as full time and part-time, and for employees and their unions to gear their organizing campaigns accordingly. As the Board put it in *Sydenham District Hospital* [1967] OLRB Rep. May 135 at 137:

"The fixing of a reasonable firm period to be considered by the Board in making such a determination has the advantage of consistency which would permit the parties to know in advance what persons are to be considered."

6. In this case the applicant submits that the date of application being August 18, 1979, seven weeks does not cover a representative period. It submits that some of the employees found to be full-time would, during a different period of the year, be found to be part-time. These employees, it is submitted, were being used to fill in for full-time employees on vacations. Consequently the union submits that the Board should examine work records going back to May 1, 1979, to establish the list of full-time employees.

7. The seven week guideline cannot, of course, be applied in an arbitrary way without regard to the case before the Board. But with certification applications now numbering over a thousand each year there is an obvious need for procedural certainty and predictability to serve the expectations of the labour relations community. There is, therefore, a substantial onus on any party requesting that the Board depart from procedures like the seven week guideline that are known, accepted and relied on by unions and employers alike.

8. Having regard to the merits of this case the Board is satisfied that it should not depart from its standard method of computing the lists of full-time and part-time employees. Vacation and holiday periods can influence the composition of a bargaining unit in many applications for certification. The hiring of employees on short term as replacements and the transfer of employees within an employer's operation are common devices to maintain or adjust production during these periods. Coming as they do at regular and predictable times, these are the kinds of factors which trade unions can and do take in consideration in the planning of their organizing campaigns. The Board therefore declines to depart from the application of the seven weeks guideline in the circumstances of this case.

9. We turn now to consider the employment status of Mrs. Glover. The evidence establishes that Mrs. Glover works as a phlebotomist in the respondent's hospital. She was hired on the understanding that as well as doing blood work she would, in her own words, "be helping out in the office too." As a result, when not doing blood work Mrs. Glover does some work as a receptionist and filing clerk in the respondent's office. The amount of office work she does depends on the need for her services in blood work. While it may be that as much as half of her time is in fact devoted to clerical duties, her first responsibility is as a

phlebotomist. As such she is part of what the Board has referred to as the health care team (*Stratford General Hospital* [1976] OLRB Rep. Nov. 459). The Board therefore finds that she is member of the technical personnel and is to be excluded from the bargaining unit.

10. The report of the labour relations officer regarding Ms. Dafoe establishes that she is employed as a bookkeeper responsible for the payroll. Her duties in that regard involve the mechanical application of policies and directives given to her by management. She does not formulate policies nor get materially involved in the preparation of budgets. She has no supervisory functions nor any role in the processing of employee grievances. Any knowledge that she may have of the salaries of supervisory or administrative staff does not place her in any conflict of interest insofar as employer-union relations are concerned. (*No Sag Spring Co. Ltd.* [1966] OLRB Rep. Dec. 667). She is essentially a clerical employee with no management functions and without confidential duties respecting labour relations.

11. The evidence respecting Mrs. Scott is similar. She is the bookkeeper responsible for accounts payable. She has no authority over other employees and has no involvement in grievances nor any other aspects of employee relations. Her authority in relation to invoices is limited and executive decisions respecting the payment of invoices rest with the Director of Purchasing. Mrs. Scott in fact exercising little or no independent authority. She is neither managerial nor confidentially employed in matters of employee relations.

12. The Board is satisfied on the basis of all the evidence before it that more than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made were members of the applicant on August 28, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

13. Since the membership strength of the applicant would entitle it only to the taking of a representational vote the Board does not need to inquire into the statement of objection filed by a group of employees.

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16. The matter is referred to the Registrar.

1556-79-M The Carpenters' District Council of Toronto and Vicinity of behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **West York Construction**, Respondent, v. Labourers' International Union of North America, Local 183, Intervener.

Arbitration – Construction Industry – Practice and Procedure – Section 112a – Intervener alleging jurisdictional dispute underlying grievance – Determination of sector in which project falls necessary – Board deferring hearing of merits of grievance and jurisdictional dispute until outcome of section 135 proceedings – Proper parties to section 135 proceedings

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members W. Gibson and C. A. Ballentine.

APPEARANCES: *Douglas J. Wray and Philip Robichaud for the applicant; S. C. Bernardo for the respondent; S. B. D. Wahl and L. Castaldo for the Intervener.*

DECISION OF THE BOARD; January 10, 1980.

1. This is a referral of a grievance to the Board pursuant to section 112a of *The Labour Relations Act*.
2. The respondent is a general contractor currently engaged in constructing a residence building at the Salvation Army Training Centre in Toronto. The respondent has contracted out certain of the work involved to a firm called Rili Brothers Forming Limited. Rili Brothers has been employing members of the intervener to actually perform the work in question.
3. Both the respondent and the intervener contend that the work being performed by the employees of Rili Brothers is within the residential sector of the construction industry and is covered both by a collective agreement between the intervener and the Metropolitan Toronto Apartment Builders Association, and also by a collective agreement between a council of unions, including the intervener, and the Ontario Formwork Association, of which Rili Brothers Forming is a member.
4. The applicant, for its part, contends that the respondent is bound by the terms of a provincial agreement between the Carpenters Employer Bargaining Agency and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America. This collective agreement relates to work performed in the industrial, commercial and institutional sector of the construction industry. The grievance filed by the applicant alleges that the respondent violated this collective agreement by not ensuring that the work in question be performed by members of the United Brotherhood of Carpenters and Joiners of America. The grievance seeks compensation on behalf of members of the Carpenters union who it is claimed lost work because of this alleged violation. Implicit in the grievance is the claim that the work is within the industrial, commercial and institutional sector.
6. At the hearing the applicant challenged the status of the intervener to participate in these proceedings on the grounds that it is not a party to the collective agreement being

grieved under. The intervener contended that underlying the entire matter was a jurisdictional dispute between the two unions and it indicated that it would be filing a complaint under section 81 of the Act with respect to this alleged jurisdictional dispute. Such a complaint has now been filed (see File No. 1661-79-JD).

6. The respondent is also of the view that a jurisdictional dispute underlies this matter. However, the respondent takes the position that before the Board considers either the merits of the applicant's grievance or of the intervener's complaint under section 81, the Board should make a determination under section 135 of the Act on the question of whether the work comes within the commercial and institutional sector of the construction industry or outside of that sector, that is within the residential sector.

Section 135 reads as follows:

"The Board shall, upon the application of a trade union, a council of trade unions, or an employer or employer's organization, determine any question that arises as to whether work performed or to be performed by employees is within the industrial, commercial and institutional sector of the construction industry referred to in clause e of section 106."

7. Both the intervener and the applicant acknowledge that to resolve this matter the Board will be required to make a determination as to whether or not the work comes within the industrial, commercial and institutional sector. The intervener submits that the matter should be determined in the context of its complaint under section 81. The applicant for its part contends that the issue should be decided simply as part of the Board's consideration of the merits of the grievance and without any consideration being given to any section of the Act other than section 112a.

8. As the Board indicated in the *Napev Construction Limited* case, [1979] OLRB Rep. Sept. 886, the proper parties in considering the merits of a grievance are those which are party to, or bound by, the collective agreement being grieved under. Accordingly, absent any consideration of section 135 it would appear that the intervener would lack status to participate in these proceedings. Section 135, however, does not concern itself with rights under a collective agreement but with "work performed or to be performed by employees". As the Board noted in the *Harbridge and Cross Ltd.* case, [1979] OLRB Rep. April 313, it follows from this that any trade unions, councils of trade unions, employers and employers' organizations which have a direct connection with the project on which the work is, or will be performed, have a sufficient interest to participate in the proceedings. In the instant case a number of employers, employers' organizations, trade unions and councils of trade unions, which have a direct connection with the Salvation Army Training Centre project, may well be affected by a determination as to which sector the work falls within, even though they would normally lack sufficient status to participate in a hearing as to the merits of the applicant's grievance. In these circumstances, we are satisfied that it would be appropriate to accede to the respondent's request and determine the issue of whether the work in question comes within the industrial, commercial institutional sector pursuant to the provisions of section 135.

9. Because of the particular issues raised by this case, we are of the view that the is-

sue of whether the work comes within the industrial, commercial and institutional sector should be determined under section 135 of the Act prior to a consideration of any other issues relevant to the grievance and before considering the section 81 complaint in File No. 1661-79-JD. In our view, this approach is likely to prove to be the most expeditious manner of proceeding.

10. In that the issue of whether or not the work comes within the industrial, commercial or institutional sector is integral to the merits of the applicant's grievance, we feel that no useful purpose would be served by requiring that a determination under section 135 be made the subject matter of a separate proceeding. Instead, we propose to adopt the following procedure. The matter will be relisted for hearing for the purpose of entertaining evidence and representations with respect to a determination under section 135 concerning whether or not the work being performed on the Salvation Army Training Centre project comes within the industrial, commercial and institutional sector. For this aspect of the proceedings any trade union, council of trade unions, employer or employers' organization having a direct connection with the project will have standing to participate. Once the issue of whether or not the work falls within the industrial, commercial and institutional sector has been determined, then the matter will again be listed for hearing to deal with any outstanding issues relevant to the applicant's grievance. For that aspect of the proceedings the proper parties will be only those who are party to, or bound by, the collective agreement being grieved under.

11. The Registrar is directed to relist this matter for hearing for the purpose of entertaining evidence and representations with respect to a determination of whether or not work being performed at the Salvation Army Training Centre project comes within the industrial, commercial and institutional sector of the construction industry. Notices of Hearing should be sent to all trade unions, councils of trade unions, employers and employers' organizations which have a direct connection with this particular project.

0863-79-M International Union of Operating Engineers, Local 793,
Applicant, v. Employer Bargaining Agency and **Williams Contracting Ltd.**,
Respondents.

Adjournment – Practice and Procedure – Section 112a – Employer alleging other parties might be affected by proceedings – Possibility of a commercial interest insufficient to establish status – No adjournment to permit notice to other persons

BEFORE: R.O. MacDowell, Vice-Chairman and Board Members C.A. Ballentine and H.J.F. Ade

APPEARANCES: *S.B.D. Wahl and E.A. Ford for the applicant; W.J. McNaughton and W. Kutynec for the respondents.*

DECISION OF THE BOARD; January 3, 1980.

1. This is an application under section 112a of *The Labour Relations Act*. That section provides as follows:

“(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 37, a party to a collective agreement between an employer or employers’ organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.”

2. The section 112a reference was filed on August 9, 1979 and involves a grievance which was delivered to the respondent employer on or about June 11, 1979 and was not amicably resolved by a meeting of the parties, held on June 21, 1979. A hearing date was scheduled for August 24, 1979 but was adjourned *sine die* on the consent of the parties. The matter came on again for hearing on November 5, 1979. The Board was in receipt of a letter from counsel for the Labour Relations Bureau of the Ontario General Contractors’ Association advising that, although named as a respondent, this employer bargaining agency did not intend to take any part in the proceedings. Despite this letter notice was, in fact, sent to both named respondents. The respondent Williams Contracting Limited (“Williams”) is represented by the same firm of solicitors as the employer bargaining agency.

3. At the opening of the hearing counsel for Williams raised certain preliminary objections to the Board proceeding on that day. It was argued that the documents before the Board were deficient in not highlighting the nature of the dispute concerning the interpretation of the agreement. Counsel contended that the employer bargaining agency might have chosen not to appear in ignorance of the true nature of the referral and that, accordingly, the Board should adjourn to give a further notice to this employer association. Since the employer association had, in fact, received proper notice of the November 5th hearing, and had chosen not to attend, the Board was not prepared to accede to counsel’s request for a further adjournment. Apart altogether from the fact that both named respondents were represented by the same firm of solicitors, the Form 7 notice specifically warns that if a party fails to attend at the hearing, the Board may proceed in its absence.

4. Counsel for Williams also argued that the nature of the respondent’s “defence” necessitated giving notice to certain other parties who might be affected by the Board’s decision. The applicant union bases its claim on a province-wide collective agreement with the respondent bargaining agency which, for the sake of convenience, we shall refer to as the “excavation agreement.” It is alleged that Williams was bound by that agreement, and had failed to apply it in respect of certain work on construction sites in which it was engaged. Counsel for Williams advised the Board that he intended to argue that Williams was bound by *another* collective agreement (the “road builders’ agreement”) with the applicant trade union, that the work in question fell within the terms of that agreement, and that the employer has been properly complying therewith. The “excavation” and “road builders” agreements, it was argued, were closely interrelated. Each applied to certain work done by operating engineers, and each established wage rates and other terms and conditions upon which that work would be done. In deciding that certain job functions fell within the scope of the “excavation” agreement, counsel argued that the Board might, *ipso facto*, be deter-

mining that those functions were not “road-building” under the “road builders” agreement. This, it was said, gave the employers engaged in road building, their employer association and, possibly, certain trade unions representing their employees, an interest in the outcome of the present proceedings and a legal right to notice thereof so that they could be present and make their submissions. It was admitted that none of these entities were parties to, or bound by, the agreement presently before us nor, in the case of the allegedly interested trade unions, is there any evidence that such unions represent any of the employees covered by the excavation agreement. None of them have had any actual notice of these proceedings. Although Paragraph 3 of Form 81 requires the respondent to list the names of other interested parties so they may be given such notice in advance of the hearing (and, as has already been mentioned, this matter has been outstanding for some time,) Williams did not file its reply until the very day of the hearing and made no effort to contact any of these allegedly interested parties – even the association of which it now claims to be a member.

5. The union contended that section 112a is a quasi contractual proceeding in which the only interested parties are those actually bound by the agreement in question. The union denies that any other party would have an interest in law or status to intervene in the proceeding, and argued that the Board should not entertain *amicus curiae* submissions in cases such as this. The union pointed to the importance of the expeditious resolution of applications under section 112a, and the complexity, delay and prejudice which would inevitably arise if interests as remote as those relied on here were sufficient to establish a right to notice. The union was also concerned that these “interests” had only been disclosed at the hearing when they could easily have been raised earlier. The union denies that it had any contractual relations with Williams for “road building work” and put the company to the strict proof of any such agreement and to its membership in the Road Builders Employer Association. In the circumstances the Board considered it appropriate to hear the employer’s evidence concerning its membership in the Road Builders Association and the existence, if any, of a collective agreement between it and the trade union respecting road building work. Such relationship might well be relevant to our determination of the employer’s preliminary motion.

6. The Metro Toronto Road Builders Association is an unaccredited employer organization. The Road Builders Agreement was signed July 28, 1978 and has an effective term from July 10, 1978 to April 30, 1980. At the time this agreement was entered into, Williams Contracting was not a member of the Association. Mr. W. Kutynec, an officer of the employer, testified that he decided to seek membership in the Road Builders Association in the summer of 1978 after speaking to certain other contractors with whom he was working on a local railway project. Mr. Kutynec hoped to take advantage of the lower wage rates payable for road building work – a kind of work in which he believed himself to be engaged. The trade union advised him that, in order to be covered by the Road Building agreement for road building work he would have to join the Metropolitan Toronto Road Builders Association (“MTRBA”).

7. Two letters filed with the Board over the signature of S.E. Dinsdale, as solicitor for the MTRBA, advising the Labourers’ International Union, Local 183, the applicant herein, that as of January 4th, 1979 Williams Contracting had become a member in good standing of the Association. These documents are, of course, written hearsay and neither Mr. Dinsdale nor any official of the MTRBA gave evidence concerning the membership of Williams Contracting in the Association. Mr. Kutynec may have *believed* himself to be a

member but the evidence concerning his actual membership is lacking. There was also filed with the Board a letter purportedly from an official of the Labourers' union addressed to the MTRBA acknowledging Williams' membership and agreeing to be bound by the terms of the Road Builders agreement in so far as Williams was concerned. This letter is also hearsay but, more significantly, there is no such equivalent document emanating from the International Union of Operating Engineers, Local 793. It is not disputed that there is no letter, communication or any other written document emanating from the Operating Engineers, and directed to either the MRTBA or Williams, indicating that the union agrees to the application of the Road Building agreement to its members employed by Williams to do road building work. Whatever may be said of the evidence linking Williams to the MTRBA, there is nothing linking the union to the MTRBA agreement in so far as that agreement applies to Williams and its employees. There is nothing before the Board to indicate that the union has bound itself contractually to Williams with respect to road building work.

8. Mr. Kutynec testified that he had *unilaterally* applied the terms of the Road Building agreement to what he considered to be road building work. He also testified that certain sums were remitted to Employee Benefit Plan Consultants Limited, the actuaries and administrators of the IOUE, Local 793, pension and welfare fund. These sums, it was alleged, were calculated with reference to the Road Builders agreement; and it was suggested that this was consistent with the conclusion that Williams was bound by the agreement.

9. On cross-examination, however, Mr. Kutynec admitted that he was not really familiar with the matter, since the calculations and deductions were made by his bookkeeper and clerical staff. Since he did not prepare the remittance forms himself he was unable to explain certain apparent inconsistencies which were brought to his attention in cross-examination. In the circumstances, therefore, we are able to give little weight to his evidence. In any event, there was no evidence that any trade union official was actually aware of these payments into the trust fund and, in so far as the road builders wage rates was concerned, the present application was made because the union believed that the rates being paid should have been, and were not, in accordance with the excavator's agreement. Indeed, although we do not rest our decision on this basis, Williams did not establish that the road building agreement was, in fact, a collective agreement. None of the signatories thereto were called to identify or prove the document.

10. Having regard to the totality of the evidence we are not satisfied that Williams has proved that it is a member of the Association or, even if it is, that membership *per se* is sufficient here to establish a contractual relationship with the union. As the Board has often noted, it is common in the construction industry for employers to honour the terms of a collective agreement as a matter of grace, and not because of any legal obligation. Such employers, although not formally bound by the collective agreement, frequently employ union members under the same terms and conditions, without any intention of thereby conferring bargaining rights on the union. Likewise, trade unions in such circumstances sometimes refrain from applying to the Board to be certified as the legal bargaining agent of the employees, even if such employees are union members (see *Ecodyne Ltd.*, [1979] OLRB Rep. July 629 and, more recently, *Metrus Contracting Ltd.*, Board File No. 1590-78-M – decision released October 1st, 1979, as yet unreported) In *Hacquoil Construction* [1963] OLRB Rep. June 143 the Board commented:

“It has also been the view of the Board that a unilateral adoption of an

agreement by a person not a party to it does not constitute a collective agreement within the meaning of *The Labour Relations Act* between such person and one or other of the parties to the collective agreement. See the *Canada Machinery Corporation Limited* case, *supra*. As the Board said in the *Foundation Company of Canada* case, 55 CLLC ¶16,078, 'there must be something more – something evidencing an agreement between that person and one of the parties to the existing agreement.' As we have already stated, the Board requires such evidence to be in writing and to be executed or signed by the parties to the agreement. Accordingly, we are also of the opinion that the mere observance of the provisions of the 'McLeod' and 'Exchange' agreements, whether by Hacquoil's or by Hacquoil's Construction Co. or by Hacquoil Construction Limited, does not constitute a collective agreement between the union and Hacquoil Construction Limited."

In the present case we are not satisfied that the union and the employer are bound by the road builders agreement nor is there any estoppel operating against the union preventing it from asserting this position. This, however, is not the end of the matter.

11. The construction industry has a unique industrial relations environment. The industry functions through a system involving owners, entrepreneurs, general contractors, management companies, subcontractors or trade contractors, employees and unions – all bound together in a web of contractual and business relationships. A system such as this requires interdependence and a close co-ordination of complementary job functions. Inevitably there will be some overlap, particularly since trade unions are organized on a craft basis and the lines between crafts have become increasingly blurred. As a result, collective agreements not only regulate complementary work functions but also, frequently, purport to distribute the same work to different groups of employees. The resulting jurisdictional dispute, if not resolved by the parties themselves, can be resolved by the Board under section 81 of *The Labour Relations Act*. Section 123 of the Act also reflects the interdependence of employers in the construction industry and the inevitable "spill over" affect of industrial conflict on a construction site. Section 123 allows "interested persons" to seek relief before the Labour Relations Board in the event that they are adversely affected by unlawful industrial conflict between *other* employers and their employees. Such provision for "interested persons" is significantly missing from section 82 of the Act – the industrial equivalent to section 123. Finally, mention might be made of the prevalence in the construction industry of employer associations (a fact recognized by the wording of section 112 which contemplates multi-party agreements) and the recently passed Bill 22 which envisages province-wide bargaining between craft unions and broadly based employer associations. The scheme of the Act does recognize, therefore, that in some circumstances, persons who are strangers to the immediate employer-employee relationship will have an interest in a proceeding before the Board, and may have a right to intervene in such proceeding. The respondent argues that, in view of the unique environment of the construction industry, the Board should give notice to, and entertain the submissions, of any interested party – even though the basis of that interest may only be in the commercial or incidental effect of the Board's ultimate decision.

12. We accept the respondent's contention that collective bargaining relationships in the construction industry are interrelated and that employers and trade unions will be inter-

ested in, and perhaps affected by, the negotiating or interpretation of collective agreements other than those to which they are immediate parties. However, we do not accept that such "third parties" are entitled, as of right, to intervene in proceedings under section 112a, (see: *Napev Construction Ltd.*, [1976] OLRB Rep. Mar. 109; application for judicial review dismissed *sub nomine*; *Bricklayers, Masons, Independent Union of Canada, Local 1 v. Ontario Labour Relations Board* – decision released May 18, 1977 – unreported) nor do we think the Board should readily exercise its discretion to add them, simply because they *may* have a commercial interest in the outcome of the proceeding. If strangers to the agreement were entitled to participate, the speed and economy which section 112a was designed to achieve would be seriously undermined, and the procedure needlessly complicated by the intervention of parties who are neither directly affected, nor bound by the legal result. Of course, nothing prevents an immediate party to a collective agreement from adducing legally admissible evidence of other bargaining relationships where such evidence would be helpful in resolving an ambiguity in the collective agreement in question. Moreover, the existence of an ongoing, quasi-contractual proceeding under section 112a does not prevent a third party from asserting statutory rights available under other sections (for example, section 81 respecting jurisdictional disputes, section 135 respecting sectoral determinations). In appropriate circumstances the Board may consolidate such proceedings with the 112a proceeding or adjourn the 112a proceeding until more general questions have been resolved. (See, for example: *Napev Construction Ltd.*, Board File No. 0534-79-M, decision released Sept. 17, 1979 – as yet unreported.) In our view these avenues are sufficient to protect third party interests and it is unnecessary to encumber a section 112a proceeding with numerous interveners in the same interest as the parties already before the Board. There may well be circumstances in which a section 112a proceeding raises questions of general interest to the industrial relations community and in those cases the Board might well wish to entertain *amicus curiae* submissions; however we are not satisfied that such circumstances exist in the present case. Accordingly, the Board is satisfied that it is unnecessary to adjourn to give notice to other parties and the Registrar is, therefore, directed to relist the matter for a continuation of the hearing on the merits.

1575-79-M Lloyd C. Hewitt, Applicant, v. Retail Clerks Union, Local 1977, Respondent Trade Union, v. **Zehrs Markets, A Division of Zehrmart Limited**, Respondent Employer.

Religious Exemption – Applicant transferred into a bargaining unit with pre-existing collective agreement containing mandatory membership provision – Application untimely

BEFORE: M.G. Mitchnik, Vice-Chairman and Board Members F.W. Murray and W.F. Rutherford

APPEARANCES: *Lloyd C. Hewitt for the applicant; Clifford Evans and Brian Williamson for the respondent trade union; R.W. Kitchen for the respondent employer.*

DECISION OF THE BOARD; January 25, 1980.

1. The applicant, Lloyd C. Hewitt, has applied on the grounds of religious conviction to be exempted from the union security provisions contained in a collective agreement between the respondent trade union, Retail Clerks Union, Local 1977, and the respondent employer, Zehrs Markets, A Division of Zehrmart Limited. The term of that agreement is January 31, 1979 to December 27, 1980, and covers the respondent employer's retail stores in the City of Guelph.

2. Mr. Hewitt is an ordained Minister of the Christian Congregations, and it is upon the beliefs of that sect that Mr. Hewitt bases his objections. He testified that the Christian Congregations is termed a "peace church" and is recognized as such by the American Government, in terms of military service. An outgrowth of the Mennonite church, the members of the Christian Congregations, according to the applicant, do not permit themselves to belong to any secular organizations or societies.

3. The employer, Zehrs Markets, operates a number of retail stores in the province, only some of which are unionized. Mr. Hewitt had worked in non-unionized stores of the employer for over two years prior to the circumstances giving rise to this application. Mr. Hewitt had been temporarily promoted to the position of Bakery Manager, but it was decided to return him to the classification of baker upon his return from surgery in October of 1979. The employer, however, did not wish to return Mr. Hewitt to that classification in the same store in which he had acted as Manager and, accordingly, transferred Mr. Hewitt to one of its stores in Guelph. At that point Mr. Hewitt became bound by the aforesaid collective agreement, including Article 2.01 of the agreement which reads:

"All employees shall, as a condition of employment, join and remain a member in good standing of the union during the entire term of the present collective agreement."

4. Mr. Hewitt has refused to join the union, on the grounds set out above. Upon learning of this, a representative of the union directed Mr. Hewitt to leave the Guelph store in which he was working. Mr. Hewitt essentially complied with this direction, and describes himself as being presently on lay-off from the company. He has, in the meantime, filed the present application for exemption.

5. Section 39 of the The Labour Relations Act provides as follows:

"(1) Where the Board is satisfied that an employee because of his religious conviction or belief,

(a) objects to joining a trade union; or

(b) objects to the paying of dues or other assessments to a trade union,

the Board may order that the provisions of a collective agreement of the type mentioned in clause *a* of subsection 1 of section 38 do not apply to such employee and that the employee is not required to join the trade union, to be or to continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, provided that amounts equal to any initiation fees, dues or other assessments are paid by the employee to or are remitted

by the employee to a charitable organization mutually agreed upon by the employee and the trade union, but if the employee and the trade union fail to agree, then to such charitable organization registered as a charitable organization in Canada under Part 1 of the *Income Tax Act* (Canada) as may be designated by the Board.

(2) Subsection 1 applies,

- (a) subject to clause *b*, to employees in the employ of an employer at the time a collective agreement containing a provision of the kind mentioned in subsection 1 is first entered into with that employer and only during the life of such collective agreement; and
- (b) where a collective agreement in force before the 15th day of February, 1971 contains the provision mentioned in subsection 1, to employees in the employ of the employer on the 15th day of February, 1971 and only during the life of such collective agreement,

and does not apply to employees whose employment commences after the entering into of the collective agreement when clause *a* applies, or on or after the 15th day of February, 1971, when clause *b* applies.”

6. The respondent trade union takes the position that the application is untimely, pointing in particular to the fact that a collective agreement containing the kind of provision mentioned in paragraph 3 has been in operation at the Guelph stores from at least as far back as January 12, 1975.

7. It is to be noted that the exemption allowed by section 39(1) of the Act is a very limited one, applying only for the duration of the first collective agreement in which the union security clause giving rise to the problem is negotiated. That is, the exemption is not a permanent one, but rather amounts, as a practical matter, to no more than a reasonable opportunity for the individual whose religious convictions prevent him from joining the Union, to seek other employment. More importantly, the exemption is only available to an employee who can bring himself within either paragraph *a* or *b* of section 39(2). In this case, it is clear that paragraph *b* does not apply. Does paragraph *a*?

8. In the *Victoria Hospital* case, [1978] OLRB Rep. June 579, the applicant had been employed since 1964 at the Westminster Hospital in London. That hospital had been covered for a number of years by a collective agreement which, by its own terms, provided the applicant with an exemption from the payment of union dues based on his religious beliefs. In 1977 the Westminster Hospital was “taken over” by the Victoria Hospital, which itself had been covered by the terms of a collective agreement with the London and District Service Workers Union, Local 220, since 1966. All of the collective agreements dating back to that year contained a union security clause which made the payment of union dues a mandatory condition of employment. As a result of the take-over by the Victoria Hospital, the employees at the Westminster Hospital then became covered by the collective agreement with the London and District Service Workers Union. Accordingly, the applicant found himself, for the first time in 1977, being required to pay union dues as a condition of his continued employment. In finding that the exemption was available to the applicant, the Board stated as follows:

"11. The applicant commenced his employment at Westminster Hospital when no union security clause was in effect. Thus it cannot be said that the grievor entered into his current job notwithstanding the existence of such a clause. Although he continued to do the same work at the same location, the applicant on October 13, 1977, found himself covered for the first time by a collective agreement containing a mandatory union security clause. Having regard to the purpose underlying section 39, we are satisfied that this situation meets the requirements of section 39(2)(a), and that the applicant was entitled to bring this application prior to the expiry of the then current collective agreement, which he did."

9. In that case, however, the collective agreement giving rise to the problem had not previously been in effect at the applicant's place of employment, the Westminster Hospital. The year 1977 was the first time such a collective agreement had been entered into covering employees *at that location*, and the Board quite properly found that situation to fall within the words of section 39(2)(a).

10. In our own case, by contrast, the only thing to have changed has been the applicant's place of employment, albeit involuntarily. The language of section 39(2)(a) simply cannot be read to embrace such a situation. The applicant cannot in this case be said to have been already in the employ of the employer "at the time a collective agreement containing a provision of the kind mentioned in subsection 1 is first entered into." Given the section as drafted, the applicant, upon being transferred into the bargaining unit for the first time, stands in no better position than an employee newly hired at that location by the company. The Board notes, parenthetically, that the seniority provisions of the instant collective agreement expressly place transferees into the bargaining unit on no higher footing than "new hires."

11. For the foregoing reasons, the Board has no alternative but to dismiss the application.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING DECEMBER 1979

BARGAINING AGENTS CERTIFIED DURING DECEMBER

No Vote Conducted

1975-78-R: Office and Professional Employees International Union (Applicant) v. United Community Fund of Greater Toronto (Respondent).

Unit: "all office, technical and clerical employees of the respondent in Metropolitan Toronto, save and except accountant, administrative assistant to the executive director, administrative secretary to the executive director, supervisors, office manager and persons above the rank of office manager." (30 employees in the unit). (*Having regard to the foregoing*).

0003-79-R: United Cement Lime & Gypsum Workers International Union AFL-CIO-CLC (Applicant) v. Federal White Cement Ltd. (Respondent).

Unit: "all employees of the respondent at its plant in the County of Oxford, save and except foremen, persons above the rank of foreman, office and sales staff, technical and laboratory staff and security guards." (19 employees in the unit).

0398-79-R: International Union of Operating Engineers, Local 796 (Applicant) v. The Cadillac Fairview Corporation Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at the Toronto-Dominion Centre, Toronto, Ontario save and except foremen, persons above the rank of foreman office and clerical staff covered by a subsisting collective agreement and students employed during the school vacation period." (# employees in the unit). (*Having regard to the agreement of the parties*).

0530-79-R: Ontario Nurses' Association (Applicant) v. St. Raphael's Nursing Homes Limited, carrying on business under the firm name and style of St. Raphael's Nursing Home (Yorkville) (Respondent).

Unit #1: "all registered and graduate nurses employed in a nursing capacity at St. Raphael's Nursing Home (Yorkville) in the City of Toronto save and except the Director of Nursing, persons above the rank of Director of Nursing and persons regularly employed for not more than twenty-four hours per week." (3 employees in the unit).

Unit #2: "all registered and graduate nurses employed in a nursing capacity regularly employed for not more than twenty-four hours a week at St. Raphael's Nursing Home (Yorkville) save and except the Director of Nursing and persons above the rank of Director of Nursing." (3 employees in the unit).

0652-79-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 141, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Tillsonburg Ready Mix Concrete Ltd. (Respondent).

Unit: "all employees of the respondent working at Tillsonburg, save and except the batcher and persons above the rank of batcher, sales and office staff." (9 employees in the unit).

0829-79-R: Canadian Union of Public Employees (Applicant) v. Township of Hamilton (Respondent).

Unit: "all employees of the respondent save and except foremen, persons above the rank of foremen, office and clerical staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period." (18 employees in the unit).

1050-79-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Norcan Developments Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all carpenters, carpenters' apprentices and construction labourers in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1060-79-R: Canadian Union of Public Employees (Applicant) v. The Brant County Board of Education (Respondent).

Unit #1: "all office, clerical and technical employees of the respondent regularly employed for not more than twenty-four hours per week and students employed during the school vacation period in the City of Brantford and the County of Brant, Ontario, save and except supervisors, and those above the rank of supervisor, dispatcher, attendance counsellors, and persons on a work experience program and persons on a government sponsored summer program." (38 employees in the unit). (*Having regard to the agreement of the parties*). (*Bargaining Unit #2 - See Application Certified Subsequent to Post-Hearing Vote*).

1212-79-R: United Textile Workers of America (Applicant) v. Firestone Canada Inc - Firestone Store (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at its Retail Store in Woodstock, Ontario save and except Store Manager, Service Manager, Office and Credit Manager, Sales Persons, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

1356-79-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. G.T. Couriers (416656 Ontario Ltd.) (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working at or out of the Regional Municipality of Hamilton-Wentworth, save and except dispatchers, those above the rank of dispatchers, sales and office staff." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1444-79-R: United Steelworkers of America (Applicant) v. Bond Structural Steel (1965) Ltd. (Respondent).

Unit: "all employees of the respondent employed at Richmond Hill, save and except assistant foremen, persons above the rank of assistant foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (34 employees in the unit).

1485-79-R: Service Employees International Union, Local 204, A.F. of L., C.I.O., C.L.C. (Applicant) v. Villacentres Management Ltd. (Respondent).

Unit: "all kitchen employees of the respondent employed at the Park Plaza Hotel in the City of Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (31 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity note*).

1503-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Alnor-Earthmoving Limited (Respondent).

Unit: "all employees of the respondent in the geographic Townships of Hope, Hamilton, Haldimand and Alnwick in the County of Northumberland engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

1504-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. Burlington Carpet Mills Canada Ltd. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed at the City of Brampton, Ontario save and except supervisors, persons above the rank of supervisors, office and sales staff, students employed during the school or university vacation period or on work term assignment." (447 employees in the unit). (*Having regard to the agreement of the parties*).

1505-79-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Toronto Resource Recovery Division of Browning-Ferris Industries Ltd. (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent working at its Resources Recovery Division in Metropolitan Toronto, save and except supervisors, those above the rank of supervisor, employees employed for less than twenty-four hours per week and students employed during the school vacation period." (employees in the unit).

1520-79-R: Office and Professional Employees International Union (Applicant) v. Oakville Autoemployees' Credit Union Limited (Respondent).

Unit: "all employees of the respondent at Oakville, Ontario, regularly employed for not more than twenty-four (24) hours per week." (4 employees in the unit). (*Having regard to the agreement of the parties*).

1529-79-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Quaker State Oil Refining Company of Canada Limited (Respondent).

Unit: "all employees of the respondent working at or out of Burlington, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (14 employees in the unit). (*Having regard to the agreement of the parties*).

1535-79-R: International Leather Goods, Plastic and Novelty Workers' Union, Local 8 (Applicant) v. Paragon Leather Goods Ltd. (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except designers, forepersons and persons above the rank of foreperson, office staff, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (22 employees in the unit). (*Having regard to the agreement of the parties*).

1538-79-R: Canadian Union of Public Employees (Applicant) v. Provincial Sanitation Services Limited (Respondent).

Unit: "all truck drivers and helpers in the employ of the respondent in its commercial division at Ottawa, save and except foremen, dispatchers, persons above the rank of foreman and dispatcher, mechanics and maintenance personnel, office, sales and clerical staff, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period, and employees of the respondent covered by a subsisting collective agreement." (19 employees in the unit). (*Having regard to the agreement of the parties*).

1558-79-R: Sutton Employees' Association (Applicant) v. Sutton Tool & Die Manufacturing Co. Ltd. (Respondent).

Unit: "all employees of the respondent at Brantford, Ontario, save and except foremen, those above the rank of foreman, office and sales staff." (29 employees in the unit).

1570-79-R: United Steelworkers of America (Applicant) v. Jarvis Clark Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at 1038 Elisabetha Street, Sudbury, Ontario, save and except foremen, supervisors, persons above the rank of foreman and supervisor, office and sales staff, employees regularly employed for less than twenty-four (24) hours per week and students employed during the school vacation period." (18 employees in the unit). (*Having regard to the agreement of the parties*).

1589-79-R: Bakery, Confectionary & Tobacco Workers' International Union Local 264 (Applicant) v. Canada Catering Co. Limited (Respondent).

Unit: "all employees of Canada Catering Co. Limited located at 174 Kennedy Road South, Brampton, Ontario, save and except foreman and foreladies, and persons above the rank of foreman and foreladies." (3 employees in the unit). (*Having regard to the agreement of the parties*).

1595-79-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the County of Brant (Respondent).

Unit: "all employees of the respondent in its Social Services Department in the County of Brant, save and excerpt supervisors, persons above the rank of supervisor, office accountant, senior bookkeeper, social services secretary, persons regularly employed for not more than 24 hours per week and student employed during the school vacation period." (27 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity note*).

1608-79-R: Office & Professional Employees International Union (Applicant) v. Kapuskasing & District Association for the Mentally Retarded carrying on business as Spruce Adult Workshop (Respondent).

Unit: "all employees of the Spruce Adult Workshop in the City of Kapuskasing, save and except manager and persons above the rank of manager." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1610-79-R: Labourers' International Union of North America, Local 837 (Applicant) v. Eastern Construction (Respondent).

Unit: "all construction labourers in the employ of the respondent in the County of Wentworth including part of Township of North Dumfries annexed from Beverly Township and the Township of Nasa-gaweya and the Town of Burlington in the County of Halton, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1621-79-R: Labourers' International Union of North America, Local 1059 (Applicant) v. D-K Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1625-79-R: Labourers' International Union of North America, Local 527 (Applicant) v. Harbridge & Cross Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1626-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Aztec Contractors Ltd. (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Waterloo except part of Beverly Township annexed by North Dumfries Township engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1627-79-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Western Dispatch Inc. (Respondent).

Unit: "all employees of the respondent working at or out of the City of Ottawa, save and except dispatchers, supervisors, those above the rank of dispatcher, supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (5 employees in the unit). (*Having regard to the agreement of the parties*).

1631-79-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Newtec Construction Ltd. (Respondent).

Unit: "all painters and painters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in The County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit). (*Clarity note*).

1636-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. P.H.O. Construction Limited (Respondent).

Unit: "all employees of the respondent in the Counties of Essex and Kent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1655-79-R: Ontario Public Service Employees Union (Applicant) v. Kingston Regional Ambulance Service – Hotel Dieu Hospital (Respondent).

Unit: "all ambulance driver attendants and dispatchers of the respondent operating out of Kingston, Ontario, save and except ambulance supervisor and persons above the rank of ambulance supervisor." (29 employees in the unit).

1659-79-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Woodington Systems Incorporated (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent working in the regional Municipality of Niagara, save and except dispatchers, those above the rank of dispatcher, office and sales staff." (8 employees in the unit). (*Having regard to the agreement of the parties*).

1672-79-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Modern Building Cleaning Division of Dustbane Enterprises Limited (Respondent).

Unit: "all employees of the respondent engaged in cleaning services at the Ontario Science Centre, Toronto, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (25 employees in the unit). (*Having regard to the agreement of the parties*).

1674-79-R: United Steelworkers of America (Applicant) v. Amalgamated Metal Industries Ltd. (Respondent).

Unit: "all office, clerical, technical and sales staff of the respondent in the City of Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, safety co-ordinator, the industrial nurse, professional engineers, Chief Accountant, general purchasing agent, secretary to the President and Controller secretary to the Vice-President, Materials Handling Division, management trainees, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by a subsisting collective agreement between the respondent and the United Steelworkers of America, Local 3315." (33 employees in the unit). (*Having regard to the agreement of the parties*).

1675-79-R: United Steelworkers of America (Applicant) v. Northern Pigment Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except foremen, persons above the rank of foreman, office, clerical, technical staff, sales staff, stationary engineers, and persons covered by a subsisting collective agreement." (15 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity note*).

1685-79-R: United Glass and Ceramic Workers of North America, AFL-CIO-CLC (Applicant) v. Sci Can Scientific Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Cobourg, save and except foremen, persons above the rank of foreman, sales staff, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (39 employees in the unit).

1692-79-R: Christian Labour Association of Canada (Applicant) v. Login Contracting Limited (Respondent).

Unit: "all insulation mechanics and insulation mechanics' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1711-79-R: Labourers' International Union of North America, Local 527 (Applicant) v. Eton Construction Ltd. (Respondent).

Unit: "all construction labourers in the employ of the respondent in the United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1714-79-R: International Brotherhood of Electrical Workers Local Union 1687 (Applicant) v. A F & W Systems Ltd. (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent within a radius of thirty-five miles from the City of Sudbury Federal Building, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1715-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. W. A. Stephenson Construction Co. Limited (Respondent).

Unit: "all employees of the respondent in the County of Grey engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1721-79-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Ajax Engineers Ltd. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Ontario (except the Townships of Pickering, Rama, Mara and Thorah) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1735-79-R: United Steelworkers of America (Applicant) v. Heritage Stove Co. Ltd. (Respondent).

Unit: "all employees of the respondent at Collingwood, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (25 employees in the unit). (*Having regard to the agreement of the parties*).

1736-79-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, AFL-CIO-CLC (Applicant) v. Brouillette's Manor Limited (Respondent).

Unit: "all employees of the respondent at Tecumseh, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and medical staff." (32 employees in the unit). (*Having regard to the agreement of the parties*).

1754-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Craftwood Construction Co. Ltd. (Respondent).

Unit: "all employees of the respondent in the County of Wellington engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

1755-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Colavita Construction Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

1783-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Econo Excavating & Paving Ltd. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

1406-79-R: International Woodworkers of America (Applicant) v. Mercedes Textiles Limited (Respondent).

Unit: "all employees of the respondent, in Hawkesbury, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (7 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	10
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	2

1512-79-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Ottawa General Hospital (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: "all power engineers and helpers in the employ of the Ottawa General Hospital." (10 employees in the unit).

Number of names of persons on list as originally prepared by employer		10
Number of persons who cast ballots	9	
Number of ballots marked in favour of the applicant	5	
Number of ballots marked in favour of the intervener	4	

1513-79-R: Canadian Union of Operating Engineers & General Worker (Applicant) v. Campeau Corporation (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: "all stationary engineers and their helpers of the respondent employed at Place De Ville project save and except the chief engineer, the assistant chief engineer, students hired for the summer vacation period." (17 employees in the unit).

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	16	
Number of ballots marked in favour of the applicant	13	
Number of ballots marked in favour of the intervener	3	

1514-79-R: International Union of Operating Engineers, Local 772 (Applicant) v. Labatt's Ontario Breweries, Division of Labatt Brewing Company Limited (Respondent) v. Canadian Union of Operating Engineers & General Workers (Intervener).

Unit: "all stationary engineers and persons primarily engaged as their helpers at the respondent's plant in Waterloo, save and except the Plant Maintenance Superintendent." (11 employees in the unit).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	8	
Number of ballots marked in favour of the applicant	5	
Number of ballots marked in favour of the intervener	3	

1515-79-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Queensway-Carleton Hospital (Respondent) v. International Union of Operating Local 796 (Intervener).

Unit: "all stationary engineers in the power house (Queensway-Carleton Hospital, 3045 Baseline Road, Ottawa) save and except chief engineer and those above the rank of chief engineer." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of the applicant	3	
Number of ballots marked in favour of the intervener	2	

1516-79-R: Canadian Union of Operating Engineers & General Workers (Applicant) v. Riverside Hospital of Ottawa (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: "all stationary engineers and persons primarily engaged as their helpers employed in the boiler room of Riverside Hospital of Ottawa, maintenance supervisor, electrician, steam fitters, painters, plumbers, carpenters, millwrights and all helpers employed in the maintenance department of the

Riverside Hospital of Ottawa, save and except ground keepers, plant superintendent and persons above the rank of plant superintendent.” (15 employees in the unit).

Number of names of persons on list as originally prepared by employer		15
Number of persons who cast ballots		15
Number of ballots marked in favour of the applicant	14	
Number of ballots marked in favour of the intervener	1	

1539-79-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Royal Ottawa Hospital Corporation Ontario (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: “all operating engineers, the general maintenance foreman, maintenance men and operating engineers employed on a part time basis and engineer apprentices.” (7 employees in the unit).

Number of names of persons on list as originally prepared by employer		7
Number of persons who cast ballots		7
Number of ballots marked in favour of the applicant	7	
Number of ballots marked in favour of the intervener	0	

Applications Certified Subsequent to Post-Hearing Vote

1060-79-R: Canadian Union of Public Employees (Applicant) v. The Brant County Board of Education (Respondent).

Unit #2: “all office, clerical and technical employees of the respondent in the City of Brantford, and the County of Brant, Ontario save and except supervisors, persons above the rank of supervisor, purchasing agent, assistant purchasing agent, assistant transportation officer, teachers’ aides, psychologists, attendance counsellors, family life co-ordinators, secretary to director of education, secretary to business administrator, academic secretaries, accounting secretary, secretary to assistant business administrator, students employed during the school vacation period, persons on a work experience program, persons on a government-sponsored summer program, persons regularly employed for not more than twenty-four (24) hours per week, and audio-visual technicians operating out of the education centre.” (78 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity noted*).

Number of names of persons on revised voters’ list		72
Number of persons who cast ballots		66
Ballots segregated and not counted	13	
Number of ballots marked in favour of the applicant	41	
Number of ballots marked against the applicant	12	

1376-79-R: Service Employees Union – Local 210, Affiliated with Services Employees International Union, AFL-CIO-CLC (Applicant) v. Kincardine and District General Hospital (Respondent).

Unit: “all employees of the respondent regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods, save and except Professional Medical Staff, Graduate Nursing Staff, Undergraduate Nurses, Graduate Pharmacists Undergraduate Pharmacists, Graduate Dietitians Technical Personnel, Supervisors, persons above the rank of Supervisor, Office and Clerical Staff and all person covered by subsisting Collective Agreements.” (12 employees in the unit).

Number of names of persons on revised voters' list		13
Number of persons who cast ballots	12	
Number of ballots marked in favour of the applicant	12	
Number of ballots marked against the applicant	0	

1432-79-R: United Steelworkers of America (Applicant) v. Automotive Hardware Limited, Automatic Screw Machine Products Limited and Federal Bolt and Nut Corporation Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all office, clerical and technical employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, salesmen, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons engaged in a co-operative program." (87 employees in the unit).

Number of names of persons on list as originally prepared by employer		83
Number of persons who cast ballots	81	
Number of ballots marked in favour of the applicant	46	
Number of ballots marked against the applicant	35	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

1255-78-R: Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Union (Applicant) v. Tip-Top Tailors (Respondent) v. Group of Employees (Objectors).
- and -

1350-78-R: Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Union (Applicant) v. Tip-Top Tailors (Respondent) v. Group of Employees (Objectors). (223 employees).

0477-79-R: Retail, Wholesale and Department Store Union, AFL: CIO:CLC (Applicant) v. Bennett Foods Limited (Respondent).

Unit: "all employees of the respondent at Kingston, save and except Department Heads and persons above the rank of Department Head." (129 employees in the unit).

1236-79-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. "The Acres" a Div. of Stan Dolyny Ltd. (Respondent). (3 employees).

1252-79-R: International Ladies' Garment Workers' Union (Applicant) v. Third Dimension Manufacturing Limited (Respondent) v. Group of Employees (Objectors). (162 employees).

1283-79-R: United Brotherhood of Carpenters & Joiners of America Local 2466 (Applicant) v. Wm. Bud. Clouthier Construction (Respondent). (4 employees).

1295-79-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Chemtrusion Inc. (Respondent).

Unit: "all employees of the respondent at Brampton, Ontario, save and except foremen, persons above the rank of foreman, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (14 employees in the unit). (*Having regard to the agreement of the parties*).

1411-79-R: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. C.D.C. Holdings Limited (Respondent) v. Engineering Constructors Association (Intervener). (14 employees).

1488-79-R: The Hotel and Club Employees' Union, Local 299, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union, (A.F.L.-C.L.C.-C.I.C.) (Applicant) v. The Prince Hotel (Toronto) Limited (Respondent). (15 employees).

1546-79-R: Laborers' International Union of North America Local 247 (Applicant) v. R. L. Wilson Engineering & Construction Limited (Respondent). (3 employees).

1619-79-R: United Brotherhood of Carpenters & Joiners of America Local #494 (Applicant) v. Taccon Construction A Division of P. AC Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1620-79-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Cooper Construction Company Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent within a twenty mile radius of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

1670-79-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Underground Services Ltd. (Respondent). (4 employees).

1671-79-R: United Brotherhood of Carpenters & Joiners of America (Applicant) v. Barry J. Lawrence Management Ltd. (Respondent). (4 employees).

1784-79-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local Union 666, Uppers Lane and Highway 58, P.O. Box 8, Thorold, Ontario (Applicant) v. Wiltshire Plumbing & Heating, No. 8 Highway, Vineland, Ontario (Respondent). (4 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

0862-79-R: Retail, Wholesale and Department Store Union, AFL: CIO:CLC (Applicant) v. A.L. Raymond Ltee/Ltd. (Respondent).

Voting Constituency #1: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton, save and except managers, persons above the rank of managers and departmental managers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (15 employees).

Number of persons on revised voters' list		16
Number of persons who cast ballots		16
Number of ballots marked in favour of the applicant	8	
Number of ballots marked against the applicant	8	

Voting Constituency #2: "All employees of the respondent in the Regional Municipality of Ottawa-Carleton regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except managers, persons above the rank of managers and departmental managers." (15 employees).

Number of persons on revised voters' list		12
Number of persons who cast ballots		10
Number of ballots marked in favour of the applicant	3	
Number of ballots marked against the applicant	7	

APPLICATION FOR CERTIFICATION WITHDRAWN

1473-79-R: Labourers' International Union of North America, Local 837 (Applicant) v. Saks Furniture Limited (Respondent). (5 employees).

1562-79-R: Canadian Union of Public Employees (Applicant) v. The Board of Education for the City of Toronto (Respondent) v. Association of Professional Student Services (Intervener). (18 employees).

1592-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. Canurban Developments Limited (Respondent). (3 employees).

1593-79-R: Service Employees International Union, Local 183, A.F. of L., C.I.O., C.L.C. (Applicant) v. United Co-Operatives of Ontario (Respondent) v. Group of Employees (Objectors). (21 employees).

1657-79-R: Canadian Union of Public Employees (Applicant) v. University Settlement House (Respondent). (50 employees).

1695-79-R: Upholsterers International Union of North America (Applicant) v. Wall-Designs (Division of Plydesigns) (Respondent). (3 employees).

1698-79-R: International Beverage Dispensers' and Bartenders' Union, Local 280 of the Hotel and Restaurant Employees' and Bartenders' International Union AFL-CIO-CLC (Applicant) v. Imperial Hotel, carrying on business as the Imperial Public Library (Respondent). (3 employees).

1709-79-R: Amalgamated Clothing and Textile Workers Union – Toronto Joint Board (Applicant) v. K & K Clothing Company Limited (Respondent). (125 employees).

1716-79-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Metalbestos Erectors Ltd. (Respondent). (7 employees).

1733-79-R: Ontario Nurses' Association (Applicant) v. Temiskaming Hospital (Respondent). (24 employees).

1750-79-R: United Food & Commercial Workers International Union Local 175 (Applicant) v. Scherers G.C. – Limited (Respondent). (7 employees).

APPLICATION UNDER SECTION 1(4)

0682-79-R: Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. J.H. Normick Inc. (Kirkland Lake Division) and Leo-Paul Turgeon (Respondents). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0982-79-R: Patricia Barta and Lenka Mayer (Applicants) v. Retail Clerks Union, Local 206, Chartered by United Food & Commercial Workers International Union (Respondent) v. St. Michael's Shops of Canada Limited (operating as Marks & Spencer) (Intervener). (*Granted*).

Unit #1: "all employees working at the intervener's retail stores in Oshawa, save and except supervisors and persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots		8
Number of ballots marked in favour of the Respondent	0	
Number of ballots marked against the Respondent	8	

Unit #2: "all employees employed for not more than twenty-four (24) hours per week and students employed during the school vacation periods working at or out of the intervener's retail stores in Oshawa, Ontario, save and except supervisors and persons above the rank of supervisor, office and sales employees." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		10
Number of persons who cast ballots		9
Number of ballots marked in favour of the respondent	0	
Number of ballots marked against the Respondent	9	

1028-79-R: Anne Haggerty (Applicant) v. Retail Clerks Union, Local 206, Chartered by United Food & Commercial Workers International Union (Respondent) v. St. Michael's Shops of Canada Limited (operating as Marks & Spencer) (Intervener). (*Granted*).

Unit #1: "all employees of the respondent working at or out of its warehouse premises in Mississauga, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales employees, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation periods." (8 employees in the unit).

Number of names of persons on list as originally prepared by employer		8
Number of persons who cast ballots	8	
Number of ballots marked in favour of the respondent	0	
Number of ballots marked against the respondent	8	

Unit #2: "all employees of the respondent employed for not more than twenty-four hours per week and students employed during the school vacation periods working at or out of its warehouse premises in Mississauga, Ontario, save and except supervisors and persons above the rank of supervisor, office and sales employees." (1 employee in the unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots	1	
Number of ballots marked in favour of the respondent	0	
Number of ballots marked against the respondent	1	

1178-79-R: Sydney Pearson (Applicant) v. Retail Clerks Union Local 206 (Respondent) v. VS Services Ltd. (Food Management Service) (Intervener). (*Granted*).

Unit: "all employees of the intervener at the premises of Imperial Tobacco at 107 Woodlawn Road West in Guelph, save and except managers, persons above the rank of manager and persons employed in the VS Services Ltd. Vending Division." (13 employees in the unit).

Number of names of persons on revised voters' list		12
Number of persons who cast ballots	12	
Number of ballots marked in favour of the respondent	0	
Number of ballots marked against the respondent	12	

1323-79-R: Randy Sinclair (Applicant) v. The Lumber and Sawmill Workers Union Local 2693 of the Brotherhood of Carpenters of Joiners of America (Respondent) v. Whitefish Pallet Company Limited (Intervener). (11 employees). (*Dismissed*).

1543-79-R: Lilian Miskic (Applicant) v. The Retail, Wholesale, Hotel and Restaurant Employees' Union and its Local #448 (Respondent) v. Fairside Tavern (Intervener). (14 employees). (*Dismissed*).

1690-79-R: Paul Allan Grocott (Applicant) v. Brewery, Soft Drink, Distillery, Distributors and Miscellaneous Workers Local 1000, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent). (1 employee). (*Dismissed*).

1722-79-R: Canwood Lachute, Division of York Transport Equipment Ltd. (Applicant) v. Local Union 2557, United Brotherhood of Carpenters and Joiners of America (Respondent). (*Granted*).

Unit: "all employees of Canwood Lachute, Division of York Transport Equipment Ltd. in Orillia, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff." (40 employees in the unit).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

1602-79-R: Local Union 636-International Brotherhood of Electrical Workers (Applicant) v. The Georgetown Hydro-Electric Commission (Office Employees) (Respondent). (*Granted*).

1580-79-R: Local Union 636-International Brotherhood of Electrical Workers (Applicant) v. The Georgetown Hydro-Electric Commission (Outside Employees). (Respondent). (*Granted*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0094-78-U: Roger St. George (Applicant) v. Respondent #1 – E.B. Eddy Forest Products Ltd.; Respondent #2 – Lumber and Sawmill Workers Union of The United Brotherhood of Carpenters and Joiners of America, Local 2693 (Respondents).

- and -

0095-78-U: Roger St. George (Applicant) v. Respondent #1 – Lumber and Sawmill Workers Union of The United Brotherhood of Carpenters and Joiners of America, Local 2693; Respondent #2 – E.B. Eddy Forest Products Ltd. (Respondents). (*Terminated*).

1450-79-U: Labourers' International Union of North America, Local 493 (Applicant) v. The Corporation of the Municipality of Casimir, Jennings & Appleby, Gaetan Gauthier, Armand Brisson, Kenneth Valin (Respondents). (*Withdrawn*).

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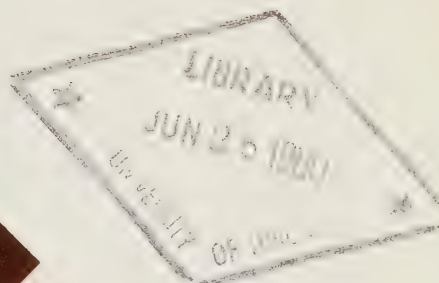
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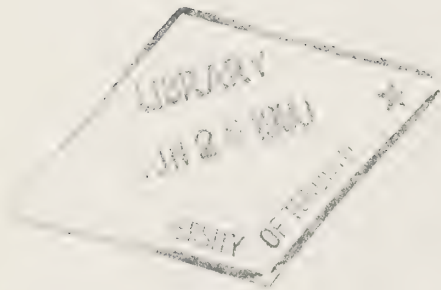
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1496-79-U 1741-79-U 1742-79-U 1803-79-U Toronto Typographical Union
No. 91 (I.T.U.), Complainant, v. **Accutext Limited**, Respondent.

Discharge for Union Activity – Employer laying off or discharging majority of union supporters – Evidence establishing downturn of business and no anti-union motive – Complaint dismissed

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members E.J. Brady and S. Lewis.

APPEARANCES: *James Buller and Emil Rosenthal for the complainant; S.J. McCormack, K. Volk and T. Baldwin for the respondent.*

DECISION OF THE BOARD; February 14, 1980

1. The Board directs that the above complaints be and the same are hereby consolidated.
2. These are complaints filed under section 79 of *The Labour Relations Act* in which the the union alleges that the respondent company has treated the named grievors contrary to the provisions of sections 58(a) and 70 of the Act. In particular, the union alleges that the termination from employment of Mr. Jose Kaufman, a union supporter, the termination from employment of Ms. Joanne MacRae, an employee to whom reference is made in a clarity note to the certificate, and the layoffs of Messrs. William J. Leeming, a member of the union's bargaining committee, and Archie MacFarlane, a union supporter, are in violation of the Act.
3. The company was incorporated in July, 1977 and carries on a computerized word processing and photo typesetting business. The complainant trade union was certified to represent the employees of the respondent engaged in composing room work by a decision of this Board dated October 10, 1979. The complainant union evidenced membership support on behalf of five of the six employees of the company coming within the bargaining unit as of September 14, 1979; the date upon which the application for certification was made. Each of the grievors named in the complaints had signed union membership cards in support of the complainant trade union. Ms. Joanne MacRae was notified by the company on October 26, 1979 that she would be laid off and was given two weeks to find alternate employment. Her employment was terminated on or about November 9, 1979. Mr. William Leeming was laid off by the company on December 3, 1979; he was recalled to work, however, on or about January 2, 1980. Mr. Archie MacFarlane was laid off by the company on December 7, 1979 and has not been recalled to work. Mr. J. Kaufman was terminated by the company on Monday, December 10, 1979. Although a number of employees have come and gone since the company commenced business in July, 1977 the layoffs of Messrs. Leeming and MacFarlane were the first in the company's history. This Board has made no prior findings against this company in respect of alleged violations of *The Labour Relations Act*. The certification application was uncontested.
4. Mr. Tom Baldwin, a solicitor with the firm of Stikeman, Elliot, Robarts and Bowman and a shareholding director and secretary of Accutext, was called to give evidence in respect of the termination of Mr. Kaufman. Mr. Baldwin carries on a corporate practice

with Stikeman, Elliot and it is his evidence that on Thursday, December 6, 1979 Citicorp Canada Limited, a major client, was attempting to arrange for the issuance of short term commercial paper in U.S. denominations for the following week. It is Mr. Baldwin's evidence that he had never used Accutext in his prior dealings with Citicorp but had preferred to deal with the most well known of the financial printing companies. After making inquiries Mr. Baldwin advised the client of his interest in Accutext and reported that Accutext could do the job within the time span stipulated. The client gave its approval and the specimen material was delivered to Accutext by courier on Friday, December 7th. The photo typesetting job involved three pages of material. Mr. Klaus Volk, a partner in the company with Mr. Baldwin and its manager, called Mr. Gary Wilkinson, a supervisor, and Mr. Kaufman together and informed them of the importance and urgency of the job. Mr. Kaufman, a typesetter, was assigned the job. He was working a 12:00 noon to 8:00 p.m. shift and finished the job that evening and had it delivered to Mr. Wilkinson by cab. The evidence establishes that Mr. MacFarlane, the full-time proofreader, had been laid off that day. The evidence also establishes, however that typesetters at this company had been required to proofread their own work on many occasions.

5. The art work, in typeset form, was delivered to Mr. Baldwin by Mr. Wilkinson on Saturday, December 8th. Enclosed were photocopies to enable Mr. Baldwin to make revisions. Mr. Baldwin had copies delivered to the client so as both he and the client could review the material over the weekend. It is his evidence that financial printers doing prospectus work are directed to send proofs to the client as a standard procedure. Mr. Baldwin testified that he did not study the material until late Sunday evening when he read it against the originals. He testified that he is used to receiving material from typesetters which is letter perfect and where the only changes made are changes of mind. Mr. Baldwin found 19 typesetting errors in the material he had received from Accutext, including three places where the word 'this' had been typeset as the word 'the'. He testified that he was "furious", and embarrassed to have delivered the work to the client. Mr. Baldwin sent corrected copies of the material to Accutext early the next morning and contacted Mr. Volk to voice his criticism and advise that he would be at the company's premises around noon.

6. Before leaving his office Mr. Baldwin composed a letter to Mr. Volk setting out his concern and criticism over the Citicorp job. The letter dated December 10, 1979 reads:

"Re: Citicorp Canada Finance Co. Ltd.

As you are aware, I am always somewhat reticent about recommending the use of Accutext to my clients in connection with any work that I am doing which requires typesetting and printing. However, in the case of Citicorp Canada Finance Co. Ltd.'s promissory notes, the client was unable to obtain a delivery commitment which would be acceptable to it, from any other source. It is most important that this job be 100 per cent accurate, completed on time and with a quality beyond criticism.

You were quite aware of this at the end of last week.

I cannot understand why you would turn this job over to an employee of such limited skills for the purpose of type setting as you must have done with the job. The proofs which were returned under separate cover this

morning of the three pages involved, each of which had very little copy, had between 5 and 10 stupid errors in each. It seems to me that the minimum requirement in even a trainee should be that they are able to do straight copy typing accurately. This was clearly not the case with the individual who set the copy for the Citicorp Canada Finance Co. Ltd. notes and I think that that individual should be released from your employment immediately on the basis that they have exhibited a complete lack of skills necessary.

Klaus, I feel that you have let me down in permitting work of such a low standard to leave Accutext. It is absolutely contrary to the image and reputation which you and I agreed would be maintained by the company. If work of this poor standard is permitted to be delivered to me I can only believe that similar work is going out to other customers. I would like you to report to me in due course the action which you are taking to remedy this extremely serious situation."

7. Mr. Baldwin arrived at the Accutext premises around noon and upon seeing Mr. Wilkinson asked him who had typeset the Citicorp job. Mr. Wilkinson replied that Mr. Kaufman had. Mr. Baldwin confronted Mr. Kaufman, who was standing close by, and shouted that there was no excuse for the Citicorp work to be released as it was, that he had never been so embarrassed in his life to have such work delivered to his client and that Mr. Kaufman was fired. He told Mr. Kaufman that he never wanted to see him again and to get out of his sight. Mr. Baldwin testified that it was his intention when he drafted the letter to Mr. Volk to see that the individual responsible for the typing errors was terminated but that at the time he did not know who that individual was. Mr. Volk testified that he had known Mr. Baldwin for four years at the time of the incident and had never seen him so upset. He described Mr. Baldwin as pale and trembling and testified that he did not interfere with the termination because he felt it was justified. Before departing the premises Mr. Baldwin apologized to the other employees present for the scene he had created.

8. Mr. Baldwin testified that he had no knowledge of who were union supporters at the time he terminated Mr. Kaufman. He testified that on advice from counsel he has intentionally not involved himself in the matter.

9. Mr. Kaufman, although present at the hearing, was not called to give evidence and in the result Mr. Baldwin's evidence as to the incident giving rise to the termination of Mr. Kaufman is largely uncontradicted.

10. Mr. Volk testified that Messrs. Leeming and MacFarlane had been laid off because of lack of work. The company's records show that total sales in each of October, November and December, 1979 were lower than the corresponding months of 1978 and that the decrease in sales from December, 1978 to December 1979 was in excess of \$4,000. Total sales in December, 1978 were \$11,753 while total sales for December, 1979 was only \$7,538, a decrease of 30 per cent. Total sales in December 1979 (\$7,538) were down over \$11,000 from the \$18,613 total sales figure from the preceding month. Mr. Volk gave uncontradicted evidence that during the period of Mr. Leeming's layoff there was never a full shift of assembly art work, the work performed by Mr. Leeming, that the company had not had any assembly art work done by outside contractors and that the company had not hired during this

period. Mr. Volk also gave uncontradicted evidence that there had not been a full shift of proofreading, the work performed by Mr. MacFarlane, since Mr. MacFarlane's layoff, that the company had not had proofreading work done by outside contractors during this period and that the company had not hired anyone to work in the composing room since the layoff of Mr. MacFarlane. Mr. MacFarlane admitted in cross-examination that prior to the layoffs employees had expressed concern to Mr. Gary Wilkinson about what was going to happen because of the lack of work. Mr. Gary Wilkinson, the supervisor, has since left the company. The company has not hired a replacement but has assigned his supervisory duties to Ms. Barbara Godkin.

11. Mr. Leeming had been advised by the company on or about September 14, 1979 that he was being terminated because of unsatisfactory work. His termination in September was made the subject of a section 79 complaint which was settled by the parties without prejudice. The company agreed to reinstate Mr. Leeming, pay him the sum of \$805 and provide him with whatever instruction assistance it can reasonably provide towards his training. Mr. Leeming in turn, agreed to reimburse the \$805 by working an equivalent amount of overtime at time and one half his rate. Mr. Leeming was indebted to the company for approximately \$700 at the time of his layoff.

12. Mr. MacFarlane commenced service with the company in May, 1979 and Mr. Leeming commenced service with the company in September, 1979. The evidence establishes that two employees with less service were retained by the company while Messrs. MacFarlane and Leeming were laid off. Mr. Paul Wilkinson, the brother of Mr. Gary Wilkinson, and Ms. Barbara Godkin were retained by the company in preference to the two grievors, although they had less service. Mr. Paul Wilkinson, a journeyman electrician, was hired by the company in October for the purpose of performing maintenance on both the company's premises and equipment. Mr. Volk has previously performed this function but testified that with his other responsibilities, especially those relating to sales, he did not have time to perform the ongoing and emergency maintenance required. Mr. Volk testified that after a period of training and familiarization Mr. Paul Wilkinson is capable of performing the maintenance function and does so not only in respect of the equipment on the respondent's premises but also in respect of equipment which the company has leased to another company. Neither Mr. MacFarlane nor Mr. Leeming are trained or capable of performing this function.

13. The evidence establishes that Barbara Godkin, the second of the employees with less service than either Mr. Leeming or Mr. MacFarlane to be retained by the company, is skilled in operating the typesetting keyboard. Indeed, Mr. Leeming referred to her as an excellent keyboard operator. Following the termination of Mr. Kaufman she was the only employee of the company assigned to the composing room with the ability to operate the keyboard. Neither Mr. Leeming nor Mr. MacFarlane possesses the necessary skills to operate the keyboard.

14. Ms. Joanne MacRae was hired by the company in early 1979 to perform receptionist, typing, bookkeeping and, when required, composing room work. The evidence is that prior to the reinstatement of Mr. Leeming in October Ms. MacRae spent about 30 per cent of her time in the composing room. A clarity note to the Board's certificate states that "it is further agreed that Joanne MacRae is within the bargaining unit when performing composing room work." Mr. Volk testified that after Mr. Leeming's return to the compos-

ing room Ms. MacRae was spending little or no time there. Mr. Volk testified that he decided that there was no need for a full-time receptionist-bookkeeper at the rate of \$195 per week and advised Ms. MacRae on October 26th that she should look for another job. He approached her on November 9th and asked her if she needed more time and was told that she did not. Ms. MacRae was not called to testify and accordingly, Mr. Volk's evidence as to the part-time nature of the remaining duties is unchallenged. The evidence establishes that Mr. Volk's wife performed the receptionist-bookkeeping function on a part-time basis for the first four weeks following Ms. MacRae's termination, at which point a person was hired to work in the office on a full-time basis for \$150 per week.

15. The company asks the Board to review Mr. Baldwin's evidence in respect of the termination of Mr. Kaufman, to draw an inference adverse to Mr. Kaufman because of his failure to testify, and find that Mr. Kaufman was terminated for reasons other than anti-union. The company asks the Board to review the evidence as it relates to the downturn in the company's business and having particular regard to the failure of the company to hire employees to perform or contract out bargaining unit work during the periods of layoff, to conclude that the layoffs were for legitimate business reasons. The company asks the Board to make the same finding in respect of the termination of Ms. MacRae.

16. The union asks the Board to review the evidence in light of the fact that shortly following certification and prior to the negotiation of a collective agreement the company moved against four of the five union supporters in the six man bargaining unit. The union asks the Board to take note of the fact that the layoffs of Mr. Leeming and Mr. Kaufman were the first layoffs in the history of the company. The union maintains that the unfairness of singling out Mr. Kaufman when Mr. Gary Wilkinson was also responsible for the Citicorp job, when considered in light of the facts referred to above, must cause the Board to infer that his termination was the result of an anti-union motive. The union relies on the retention of junior employees and the fluctuations in the company's accounts receivable in 1978/79 without prior layoffs as supportive of its position that all of the evidence supports the inference of an anti-union motive as underlying the layoffs of Messrs. Leeming and MacFarlane. The union maintains that it is rare in the typesetting business to retain the services of a full-time maintenance man and asks the Board to conclude that Mr. Wilkinson was retained in preference to Messrs. Leeming and MacFarlane because he was not a trade union supporter. The union relies on the eventual hiring of a full-time receptionist-bookkeeper in place of Ms. MacRae as supportive of its position that Ms. MacRae was released as part of a broader scheme to undermine the trade union.

17. A strong suspicion attaches to company actions directed against union supporters following closely upon an application for certification or the certification of the trade union. This is especially so where, as in this case, the bargaining unit is small and the company is moving only against union supporters and where, as in this case, the company is taking actions of a type which have never been taken before. Even without the statutory reversal of the onus in cases where it is alleged that a person has been refused employment, discharged, discriminated against, threatened or coerced as to his employment, opportunity for employment or conditions of employment the company in this case would be required to come forward with evidence of legitimate purpose in order to overcome the natural inferences flowing from the circumstantial evidence. We are satisfied that the company has come forward with such evidence.

18. There is no doubt on the evidence of Mr. Baldwin and Mr. Volk, who witnessed Mr. Baldwin's termination of Mr. Kaufman, that Mr. Baldwin acted to terminate Mr. Kaufman in a fit of anger because of the embarrassment brought on by his dissatisfaction with the quality of the Citicorp job. We are satisfied that Mr. Baldwin had no knowledge of Mr. Kaufman's trade union affiliation at the time he terminated his services and that even if he had such knowledge, he had made up his mind to terminate the individual who typeset the job before he knew the identity of the individual. While the Board has some sympathy for Mr. Kaufman in that he was required to perform the difficult task of proofreading his own work and because Mr. Gary Wilkinson, the supervisor, shared responsibility for the job, our statutory mandate is to determine if the company acted against Mr. Kaufman for anti-union reasons. *The Labour Relations Act* does not protect employees from the unfair or unreasonable actions of their employers if those actions are not tainted by anti-union motive. Whatever might be said of the fairness of Mr. Baldwin's termination of Mr. Kaufman, the evidence establishes that he was not motivated by anti-union considerations and accordingly, this complaint as it relates to Mr. Kaufman is hereby dismissed.

19. The evidence establishes a significant downturn in the company's business in the month of December, 1979 as would have required the company to reduce its costs or take other measures in response. The company's \$7,538 sales figure for the month of December, 1979 was below the figure for the corresponding month of the previous year and in excess of \$11,000 below the sales recorded for the preceding month. The evidence establishes that the bargaining unit employees were concerned about the downturn in business to the point of making inquiries of the supervisor as to what might happen. The layoff of Mr. Leeming at a time when he was committed to work approximately \$700 of overtime without charge to the company underscores the other evidence which establishes a significant and substantial downturn in the company's business as would explain the decision to lay off employees. This evidence rebuts the inference to be drawn from the timing of the layoffs and from the fact that these were the first layoffs in the history of the company.

20. The company is a relatively small one, requiring only six bargaining unit employees at peak. The company requires defined human skills in order to operate and in these circumstances, the decision of the company to lay off out of seniority is not surprising. None of the employees with whom we are concerned can be classed as long service and in the result, the decision of the company to retain a journeyman electrician capable of performing the maintenance function and a skilled keyboard operator in preference to more senior employees lacking these skills does not cause the Board to draw an inference against the company. Where reference is had to the recall of Mr. Leeming, to the fact that no bargaining unit work was contracted out during the period of his layoff or during the period of Mr. MacFarlane's layoff and to the fact that the company did not hire anyone to perform bargaining unit work during the periods of layoff, this Board can come to no other conclusion but that the company had legitimate business reasons to lay off and in selecting Messrs. Leeming and MacFarlane it does not violate *The Labour Relations Act*. Accordingly, this complaint, as it relates to Messrs. Leeming and MacFarlane, is hereby dismissed.

21. The uncontradicted evidence before this Board is that at the time Mr. Volk asked Ms. MacRae to seek alternate employment her work load was down by approximately 30 per cent. Whereas she had previously worked in the composing room 30 per cent of the time, she was no longer required to perform composing room work. Again the issue is not whether Mr. Volk should have offered Ms. MacRae continued employment at a lower sala-

ry, but rather, whether he violated *The Labour Relations Act* in asking her to seek alternate employment when he did. We are satisfied on the evidence that Mr. Volk asked her to seek alternate employment so as he could replace her with a part-time employee and not because she had signed a union card. The fact that the company hired a full-time office person at \$45 a week less than Ms. MacRae after staffing the office on a part-time basis for one month does not alter the result. The complaint as it relates to Ms. MacRae is hereby dismissed.

22. Having regard to all of the foregoing, each of the complaints before the Board is hereby dismissed.

1899-79-R Local 636 of the International Brotherhood of Electrical Workers, Applicant, v. Ajax Hydro-Electric Commission, Respondent.

Sale of a Business – Hydro Commission of Ajax and Pickering Public Utilities Commission coming together by statute – Predecessor employers municipalities – Deemed intermingling pursuant to Section 55(11)

BEFORE: R. A. Furness, Vice-Chairman, and Board Members O. Hodges and F. W. Murray.

APPEARANCES: *Wm. J. Moore and J. Miller for the applicant; no one appearing for the respondent.*

DECISION OF THE BOARD; February 28, 1980

1. The applicant has applied to the Board under section 55 of *The Labour Relations Act* with respect to its bargaining rights. The applicant alleged in its application that a sale of a business by the Hydro-Electric Commission of the Town of Ajax, the Public Utilities Commission of the Village of Pickering and Ontario Hydro to the respondent allegedly took place on or about January 1, 1980. The applicant has also alleged in its application that an erection of one or more municipalities into another municipality or an amalgamation, union or other joining of two or more municipalities involving the respondent and the Hydro-Electric Commission of the Town of Ajax, the Public Utilities Commission of the Village of Pickering and Ontario Hydro allegedly took place on or about January 1, 1980. The applicant has in its application adopted the position that, as a result of the foregoing, the respondent is either bound by a collective agreement dated March 1, 1978, which was entered into by the applicant and the Hydro-Electric Commission of the Town of Ajax, or the respondent is required to bargain with the applicant with a view to making a collective agreement. The applicant has also alleged in its application that a change in the character of the business so that it is substantially different from the business of the predecessor employer has not taken place. The applicant has further alleged in its application that an intermingling of employees of one business with employees of another business represented by a trade union has taken place, or is about to take place.

2. In its application the applicant has set forth the following statements:

“(a) Prior to January 1st, 1980 the Applicant was bargaining agent for the employees engaged in the distribution and supply of power in the area within the area municipalities of the Town of Ajax, in the Regional Municipality of Durham and was party to the following Collective Agreement with the Municipalities, Local Boards or Commissions, as the case may be:

(i) The Applicant is party to a Collective Agreement dated March 1, 1978 with the Hydro-Electric Commission of the Town of Ajax for the office and outside employees in the employ of the said Ajax Hydro.

(b) Prior to January 1st, 1980, the employees of the Public Utilities Commission of the Village of Pickering engaged in the distribution and supply of power were not represented by any Trade Union.

(c) Prior to January 1st, 1980, the employees of Ontario Hydro rural service were represented by Canadian Union of Public Employees Local 1000.

(d) In accordance with the Durham Municipal Hydro-Electric Service Act 1979, from and after January 1st, 1980 the exclusive responsibility and authority for the distribution and supply of power in the area within the area municipalities of the Town of Ajax, The Village of Pickering, in the Regional Municipality of Durham was vested in the Respondent and certain of the employees of [the Hydro-Electric Commission of the Town of Ajax, the Public Utilities Commission of the Village of Pickering and Ontario Hydro] became employees of the Respondent.”

3. The applicant in its application has requested the following relief:

(a) A declaration that the applicant is bargaining agent for the employees of the respondent engaged in the distribution and supply of power within the area municipalities of the Town of Ajax, the Village of Pickering and the Regional Municipality of Durham.

(b) A declaration that the respondent is bound by the collective agreement referred to in paragraph one herein for the employees covered by the bargaining unit set forth in (a), or,

(c) an order that the respondent is required to bargain with the applicant with a view to making a collective agreement for the employees engaged in the bargaining unit set forth in (a).

4. The respondent in its reply stated that it had assumed the assets and liabilities of the Hydro-Electric Commission of the Town of Ajax and the Public Utilities Commission of the Village of Pickering and had purchased certain assets of Ontario Hydro within the Town of Ajax. The respondent further stated in its reply that it had no objection to the application except for matters referred to in paragraph 2(b) and 2(d) herein. The respondent also stated

that Pickering Village Public Utilities Commission did not have employees and that the two part-time functions, i.e., meter reading and management were performed by contract and that the people involved were not entitled to transfer or union membership.

5. On June 22, 1979, Bill 123, an Act to provide for Municipal Hydro-Electric Service in the Regional Municipality of Durham, came into force. The short title of this Act is *The Durham Municipal Hydro-Electric Service Act, 1979*, (the "Act"). This Act established the respondent and various other hydro-electric commissions for various other area municipalities. Under this Act for the term expiring on November 30, 1980, the respondent consisted of the mayor of the Town of Ajax and certain persons to be appointed by the council of the Town of Ajax from (a) the Hydro-Electric Commission of the Town of Ajax as it existed immediately before the coming into force of this Act, (b) the Public Utilities Commission of the Village of Pickering as it existed immediately before the coming into force of the Act, and (c) a resident outside the part of the Town of Ajax supplied with power by a municipal commission immediately before the coming into force of this Act.

6. In addition, the Act provides that certain powers, rights, authorities and privileges with respect to power were on and after January 1, 1980, to be exercised on behalf of the Town of Ajax by the respondent. With certain exceptions, the respondent has the sole right to distribute and supply power within the Town of Ajax. On January 1, 1980, all assets under the control and management of and all liabilities of the Hydro-Electric Commission of the Town of Ajax and the Public Utilities Commission of the Village of Pickering, became without compensation, assets under the control and management of and liabilities of the respondent. In addition, on or before January 1, 1980, the respondent was required to purchase on behalf of the Town of Ajax, and Ontario Hydro was required to sell to the respondent the assets and liabilities of Ontario Hydro that pertain to the distribution and supply of power at retail in the Town of Ajax.

7. The Act also provides for the transfer of employees who were employed in the distribution and supply of power to the respondent, the payment of wages or salaries by the respondent to such employees and the transfer and application of pension credits and guarantees, group life insurance and sick leave.

8. The Board served notice of this application on those parties which had been listed by the applicant as either predecessor employers or as having an interest in this application. The Board served notice of this application on the Hydro-Electric Commission of the Town of Ajax, the Public Utilities Commission of the Village of Pickering, Ontario Hydro and the Canadian Union of Public Employees, Local 1000. None of these parties either appeared before the Board or made representations to the Board.

9. During the hearing the applicant informed the Board that none of the employees of Ontario Hydro had become employees of the respondent and that there were no employees of the Public Utilities Commission of the Village of Pickering involved in this application. The applicant advised the Board that meter reading and management functions for the Public Utilities Commission of the Village of Pickering were not performed by its employees. The applicant further advised the Board that twelve employees are affected by this application and that the respondent had neither sent a letter to the applicant with respect to the relief it is seeking under section 55 of *The Labour Relations Act* nor signed a collective agreement.

10. The Board finds that the respondent, the Hydro-Electric Commission of the Town of Ajax and the Public Utilities Commission of the Village of Pickering are or were municipalities as defined in section 1(f) of *The Municipal Affairs Act*, R.S.O. 1970, c. 118, as amended. The Board further finds that either the Hydro-Electric Commission of the Town of Ajax and the Public Utilities Commission of the Village of Pickering have been erected into the respondent or the Hydro-Electric Commission of the Town of Ajax and the Public Utilities Commission of the Village of Pickering have been amalgamated, united or otherwise joined together to form the respondent within the meaning of section 55(11) of *The Labour Relations Act*. By virtue of section 55(11)(b) the respondent has the like rights and obligations as a person to whom a business is sold under section 55 and who intermingles the employees of one of his businesses with those of another of his businesses. By virtue of section 55(11)(c) the applicant has the like rights and obligations as it would have in the case of the intermingling of employees in two or more businesses under section 55. While there is a deemed intermingling of employees under section 55(11), in actual fact only the former employees of the Hydro-Electric Commission of the Town of Ajax who became employees of the respondent are affected by this application.

11. The applicant and the Hydro-Electric Commission of the Town of Ajax were bound by a collective agreement which became effective on March 1, 1978, and remained in effect until February 28, 1980. The bargaining unit set forth in the collective agreement is defined as "all employees of the [Hydro-Electric Commission of the Town of Ajax], save and except foremen, those above the rank of foreman, and the secretary to the general manager".

12. Having regard to the foregoing and pursuant to sections 55(2) and (3) of *The Labour Relations Act*, the Board declares that the respondent became bound by the collective agreement referred to in paragraph 11 on January 1, 1980, and that the applicant continues to be the bargaining agent for the respondent's employees in the like bargaining unit.

0696-79-R Ontario Public Service Employees Union, Applicant, v. Art Gallery of Ontario, Respondent, v. Group of Employees, Objectors.

Natural Justice – Petition – Reconsideration – Board relying on evidence given in related proceeding improper – Whether Board may cure defect by reconsideration without considering impugned evidence – Petition not disclosing voluntary opposition to union

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members F. W. Murray and A. Hershkovitz.

APPEARANCES: *Chris Paliare and Pauline Anidjar for the applicant; Corinne Murray for the respondent; Michael Horan for the objectors.*

DECISION OF THE BOARD; February 13, 1980

1. The group of objectors, by letter dated January 3, 1980 directed to the Registrar,

requests the Board to reconsider its decision of November 29, 1979. The grounds on which the request is made are set out in the letter as follows:

- “1. The Board in its decision, and in particular at paragraphs 9 and 10, paid some considerable attention to testimony purportedly given by Albert Schilling.
2. In reaching its decision the Board obviously relied upon the purported testimony of Albert Schilling and in that regard I would refer to paragraphs 24 and 28 of the decision.
3. Albert Schilling did *not* give any testimony in connection with the petition. I am aware that he may have given some testimony in related proceedings under Section 79 of The Labour Relations Act, but he did not testify in our case.
4. There is a clear error on the face of the record in these proceedings in that the Board relied upon evidence which was not given.

Since there is a patent error in the decision and since the Board could not possibly purport to make a decision now which would appear to be just to all parties, the writer would request that a new hearing of the Board be convened before a different panel to hear the matter afresh.”

2. This request for reconsideration arises out of a certification application which also involved a request by the applicant that the Board make a finding under section 7a that there had been a contravention of the Act by the respondent such that the true wishes of the employees are not likely to be ascertained and that a certificate should therefore issue.

3. In addition to these matters before the Board in the certification application, the Board also had a number of section 79 complaints and a request for consent to prosecute before it, all initiated by the applicant union and to which the group of objectors were not a party. These complaints were alleged to be founded on circumstances relating to the overall organizing campaign. A brief review of the procedural history of this matter, leading to the current request for reconsideration, is therefore required.

4. The application for certification was filed with the Board on July 16, 1979. On July 20th the Board commenced hearings with respect to Board File No. 0600-79-U which was a section 79 complaint made by the Ontario Public Service Employees Union alleging contraventions by the Art Gallery of Ontario in its dealings with three employees, Carol Kestenberg, Lynn Burry and Harriet Stroud, of the Art Gallery. Also on July 20th the Board commenced hearings with respect to Board File No. 0563-79-U which was also a section 79 complaint involving the same parties and in which it was alleged that the Art Gallery in its dealings with three other employees, Richard Gold, Albert Schilling and Dan Thibodeau, had committed violations of the Act. The hearing of July 20th was adjourned and scheduled for continuation on August 20th. During the adjournment, two further section 79 complaints were filed (Board File No. 0785-79-U on July 27th and Board File No. 0858-79-U on August 8th).

5. On resumption of the hearing on August 20th, the Board received representations from the parties as to the procedure it should follow in the hearing of these matters and the Board ruled that it would continue to proceed with the two section 79 complaints (Files 0563-79-U and 0600-79-U) and, on completion, would commence hearings with respect to the application for certification and thereafter to commence hearings into the remaining two section 79 complaints. The Board continued to hear evidence with respect to Board Files 0563-79-U and 0600-79-U on August 27th and September 10th and on September 28th heard final argument with respect to both files. By decision dated October 20, 1979, the Board found the Art Gallery of Ontario had contravened certain sections of *The Labour Relations Act* in its dealings with Richard Gold, Albert Schilling, Carol Kestenberg, Lynn Burry and Harriet Stroud. Written reasons were subsequently issued under date of November 28, 1979.

6. On October 10th the Board opened hearings into the application for certification and commenced the receipt of oral testimony relating to the circumstances concerning the origination of statements of desire filed with the Board and relating to the manner in which each signature on such statements was obtained. Evidence into these matters continued to be heard on October 11th and on November 7th.

7. At the opening of the hearing on November 7th, the Board was informed by counsel for all the parties that they were agreed on requesting that the Board, on conclusion of evidence relating to the statements of desire, then hear argument as to what conclusions the Board should draw as to the voluntary nature of such statements. Counsel joined in urging the Board to issue a decision in this regard at an early date and without awaiting final disposition of the entire application. It should be noted that at this point of the Board's processing of the certification application, there remained two additional elements yet to be examined; one being the applicant's request of July 17th that the Board exercise its discretion under section 7a of the Act to issue a certification without a representation vote and, the other, a determination of the appropriate bargaining unit which continued to be the subject of examination of a Labour Relations Officer.

8. The Board acceded to the request of the parties and agreed to proceed in the manner suggested and to isolate the issue of the statements of desire. This decision of the Board represented a departure from its more normal practice of receiving evidence in respect to all matters in issue in a proceeding prior to receiving final argument. The decision was justified in the Board's mind on the grounds that it might expedite final disposition of the entire certification matter. This was the position of all counsel.

9. In any event, the Board, after hearing some further testimony on November 7th, received argument of all parties with respect to what decision the Board should make regarding the statements of desire of the objectors. Counsel for the objectors then withdrew with an apparent general understanding between counsel that he would be notified as to when, in the ongoing proceedings, issues of interest to the objectors were likely to come forward. The Board continued that day to commence to take evidence relating to the applicant's section 7a request, including testimony from Albert Schilling which latter evidence the Board canvassed in its decision of November 29, 1979 and which has attracted the objection by Mr. Horan for the group of objectors. The hearing was then adjourned to be continued on December 6, 1979. Prior to reconvening on December 6, 1979 the Board issued its decision of November 29, 1979 in which the Board ruled that it was not satisfied that the

statement of desires and petitions filed on behalf of a number of employees represented a voluntary expression of the true wishes of the said employees. At the Board hearing on December 6, 1979 evidence in respect to the section 7a matter was concluded and final argument in respect to that matter was received. The Board then adjourned the proceedings to be continued at a later date in respect to the determination of an appropriate bargaining unit, and proceeded on December 7th to deal with an application for consent to prosecute filed by the union on August 27, 1979 and naming as respondents, William J. Withrow, Herbert D. Grant, Catherine Goldsmith, John Rusekas, Nancy Hushion, Jack Willson, Wilbert Headley and The Art Gallery of Ontario.

10. On December 10, 1979 there was filed with the Board a written agreement between the applicant and the respondent in which, *inter alia*, the parties agreed on a description of the appropriate bargaining unit save for four classifications which remained in dispute between them. On December 10, 1979 the applicant, in writing, requested that the Board exercise its discretion under section 6(1a) of the Act to certify the applicant. The Board, on December 28, 1979, issued a decision which certified the applicant pending the final resolution of the composition of the bargaining unit.

11. The Board referred the objectors' letter request of January 3, 1980 for reconsideration to the other parties inviting comments. Subsequently a hearing was held to receive representations of all parties. The Board acknowledges that in paragraph 28 of its November 29th decision the reference to a Board decision of August 23rd is an obvious typographical error. The reference should have been to a Board decision of October 30th in respect to a section 79 complaint. It was Schilling's participation in that proceeding which was referred to in Headley's evidence as to the circumstances surrounding the signing by Schilling of the letter of withdrawal and the petition. The Board acknowledges that the evidence of Schilling was heard in connection with the applicant's request that the Board exercise its discretion under section 7a. This evidence was heard after Mr. Horan had withdrawn from the proceedings and it is the canvassing of this evidence by the Board to which he objects. The question before us is what, if anything, should the Board now do in order to respond to Mr. Horan's concern.

12. Counsel for the objectors (in whose representations counsel for the respondent joined) argued that while the entire certification application could be heard afresh by a different panel of the Board, the Board also had the authority under section 92(2)(h) to make a reference to another panel of the Board for the sole purpose of making a determination as to the voluntariness of the statements of desire. Counsel referred us to the statement of the Board in the case of *Imperial Tobacco Products (Ontario) Limited*, [1974] OLRB Rep. Sept. 609 where the Board, in discussing its jurisdiction under section 95(1) of the Act, stated:

"However, this jurisdiction is very carefully and cautiously exercised by the Board in that free recourse to the Board after the initial disposition of a matter would substantially undermine those values of speed and economy associated with the administrative practice of this Board."

Counsel emphasizes that the "values of speed and economy" should cause the Board to take the course of a restricted reference to another panel, and that a fresh hearing by a new panel is necessary in order that justice be seen to be done. Alternatively, counsel argues that the

Board should exercise its discretion under section 7(2) of the Act by ordering a representation vote and that this course also meets the test of “speed and economy”. Important to both proposed courses of action it was argued was that they would lend “the reasonable belief that justice was being done”.

13. The applicant argues that in the total context of the certification application it is not possible to isolate out the issue of the voluntariness of the petition from other aspects of the case, and that, even if it were, the fact that three days of hearing were required on that issue by this panel and in the case of a fresh panel it might be more extensive indicates that the proposal does not meet the “speed and economy” test. The applicant discounts the need for a fresh hearing by a new panel in order that justice be seen to be done. He points to the fact that all parties were aware that this panel of the Board, in addition to hearing the certification application, also heard and decided on other interrelated proceedings and that the objectors were also aware that while the Board was considering the matter of the voluntariness of the petition, it would be going forward to hear evidence in respect of the application of section 7a. In respect to the objectors’ proposal that a vote be directed, the applicant argued that this avenue would be no less costly and no more expeditious than other alternatives available to the Board and runs counter to the representations made by the applicant in the section 7a issue that under all the circumstances a vote would not be likely to ascertain the true wishes of employees.

14. The applicant argues that the Board should consider two other alternatives available to it: either to recall Schilling and rehear his evidence with the objectors having the right of cross-examination and reply, or to disregard Schilling’s testimony and make a decision considering only the remaining evidence. The objectors argue that to hear Schilling’s evidence anew is similar to permitting a party to use reconsideration proceedings to cure a defect in his case; and that the proposal for this panel to now disregard the evidence of Schilling and make a decision based on the remaining evidence would inevitably leave the decision with an appearance of justice not having been done.

15. Section 95(1) of the Act explicitly confers on the Board a broad power of reconsideration and reads, in part:

“... the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling...”

16. In the instant case it is alleged that the Board erred in respect to considering the evidence of one witness. It is our view that the possible correction of errors of this type must have been within the contemplation of the Legislature in providing the Board with powers of reconsideration in section 95(1). The issue before us is whether or not the particular error alleged can be appropriately cured by the powers conferred on the Board under this subsection.

17. It is argued that the reconsideration of the matter should not be by this panel of the Board as presently constituted because of the apprehension of bias arising out of the fact that the present panel had previously made a decision on the matter. However, the decisions in *Posluns v. Toronto Stock Exchange* [1968] S.C.R. 330, and in *Re French and the Law So-*

ciety of Upper Canada [1972] 2 O.R. 766 establish the proposition that the mere fact that a tribunal has previously made a determination on the issue does not, in itself, raise a reasonable apprehension of bias which would prevent that same tribunal from again considering the issue fairly and honestly.

18. It must be noted that in the prior proceeding the Board had heard eight witnesses over the course of three days under circumstances such that the rights of all parties were observed and the evidence of those witnesses was unflawed by any procedural defect. It must also be noted that the Board then received the argument of all parties as to the conclusions the Board should draw from such evidence. It was following this that the Board received the evidence of one witness, testifying as to another issue in the overall proceedings and which, it is alleged, the Board wrongly took into consideration in arriving at a conclusion in respect to the issue as to the voluntariness of the statements of desire before it. The evidence of that one witness was distinctive in that it did not touch on incidents or events to which the other witnesses testified. We also note that the Board has heard much evidence in the many related applications and complaints between these parties and has done so with the knowledge of all the parties. Indeed, to have many different panels of the Board hearing all these related applications and complaints would have been inefficient and chaotic. We are satisfied that under these circumstances such evidence can be isolated and fairly disregarded in any re-evaluation of the weight to be accorded to the statements of desire. We have concluded, after considering the representations of counsel, that in the circumstances of this case this panel of the Board as presently constituted may properly proceed to reconsider this matter.

19. For these reasons there is no useful curative purpose served in re-hearing the evidence of the eight witnesses previously heard: all parties were present and participated in the hearing of this testimony and all parties were then content that the Board should make its decision based on that evidence. Given the discrete nature of the evidence objected to, we have concluded that for the Board to now spend additional days in receiving the unimpugned evidence unnecessarily makes for further lengthy delays in what has already been a protracted proceeding; militates against the purpose of "speed and economy" underlying the Board's reconsideration powers; and is not necessary to guard against legal bias.

20. The Board therefore now directs its mind to considering afresh the evidence previously properly adduced, and will now set out its review of the evidence heard and without consideration of any evidence other than that of the eight witnesses above referred to and without regard to any determination made in any other proceeding before the Board.

21. In the instant case a number of statements of desire were filed with the Board. One such was a document prepared by Mr. Brian Stratton and bearing the signatures of himself and two other persons, which latter Stratton secured. The Board is satisfied from Stratton's evidence of the voluntariness of this document.

22. The Board also had a further statement of desire filed with it and bearing one signature. No person appeared before the Board to give evidence as to the origination of this document and the Board is unable to make a finding as to its voluntariness.

23. There were 11 individual signed letters to the Board all bearing the date of July 13, 1979 and bearing the typewritten text (and repeated in the handwriting of the signatory), "I wish to withdraw my support of OPSEU in its negotiations with the Art Gallery of Ontar-

io". This form letter was actually prepared by Mr. Headley on July 10th at which time it should be noted that the application for certification had not yet been filed and the date of July 13th was placed on the letter as being Headley's best estimate of when the certification application would be filed.

24. Headley testified that he had gone to the Board offices during his morning coffee break on July 10th and showed a copy of the draft letter he had prepared to an Information Officer, secured copies of the Act and other information and returned to the Art Gallery. He then had the form letter typed by a secretary in the Audio-Visual Department and then ran off duplicate copies without charge on duplicating equipment in the adjoining library.

25. One of these withdrawal letters was signed on July 12th by Michael Hough, a maintenance worker. Hough testified that prior to the start of work on July 12th he participated in a discussion which took place in the Maintenance Department locker room where it is customary for some employees to gather before work, read the newspaper and have coffee. J. B. Willson, Hough's supervisor, is regularly in attendance at such meetings and on the morning of July 12 in addition to Willson and Hough, there were two other employees. On this occasion, according to Hough, Willson introduced the union topic and spent 5-10 minutes expressing his personal point of view in respect to the union. Hough states Willson is not in favour of the union and Willson's personal point of view which he expressed, is opposed to it and that Willson talked about contracting out only in the context of what a contracting maintenance worker earns. Hough stated he had signed a union card but, in his words, "Willson never asked me at the beginning because he knew I had joined the union on the previous time. I don't know if he knows I signed a withdrawal statement". Hough stated that in response to Willson he told Willson of the difference between what he got paid and "what the Union could offer me" and Willson was showing him that other professions also made more than Hough. Hough stated that "I think everyone knows how Willson feels about the Union anyway because of the previous year", and that the conversation did not cause him to change his mind and that he had changed his mind because he planned to leave the Gallery in September and felt his vote should not be counted one way or the other.

26. Hough, who stated that he was not at that time aware he could revoke his union membership, sought out Headley at his work place at lunch break on July 12th as he had heard from other employees that he could withdraw his support by contacting Headley. Hough knew Headley fairly well as a result of discussing sports, etc. with him "sometimes in my bosses office at coffee or lunch, or around the Gallery". Headley supplied a withdrawal form from a duffel bag that he always carried to and from work, and Hough signed.

27. On July 13th Hough was approached by a group of three persons during lunch hour enquiring as to whether Hough knew how to withdraw from the Union. Hough acknowledged that he did and contacted Headley after work on that day, and secured additional copies of the form on July 13th, secured signatures of the three and returned the documents that day to Headley.

28. Harold Boyd, Supervisor of Cafeteria, was also an employee who signed a withdrawal letter. Boyd testified that some time in July he met J. B. Willson who made the statement, "I thought you were fairly intelligent" and that in response to Boyd's question of "why?", Willson alluded to the fact that he knew Boyd had signed a union card, and Boyd told him he had. According to Boyd there was a second conversation at some later time in

the staff lounge where Willson told him if he wanted to withdraw his union card he could. Boyd says he had told Willson previously that he wanted to withdraw and had phoned the Labour Relations Board and had been told that he was unable to do this, which statement he testified was a lie which he entered into because he had been listening to a few stories that he would lose his job if the Union didn't get in and, in his words, "I was trying to protect myself. I don't think I'll start anything again". Boyd states that during this conversation Headley came into the staff lounge and Willson asked him "if he had whatever it was I had to sign" to which Headley replied that he didn't but would go and get some. Willson then left. Headley returned with the form and Boyd signed it. Boyd also subsequently signed the petition and when asked in cross-examination as to why he signed the petition, his reply was "Same reason as for withdrawal. So management would have my name down as being against the Union".

29. Headley's version of Boyd's signing a withdrawal form was that he (Headley) walked into the staff lounge, saw Boyd there and asked him if he'd like to sign a withdrawal and that Boyd responded affirmatively and signed the form whereupon Bradley thanked him and left. Headley states Willson was not present during this conversation as Willson had walked out as Headley walked in to the lounge. Headley further states that at the time he was carrying his supply of withdrawal forms on his person because of a "break in". In cross-examination the question was put to Headley that when he entered the lounge Willson and Boyd were talking and that Willson asked Headley if he had any withdrawal forms on him and that Willson told him to go and get some. To which question Headley replied that it was not true and had not taken place. When the further question was put to him as to why Boyd would lie about it, Headley related a telephone conversation he had had with Boyd. Headley states that "when all this took place" Boyd had phoned him saying someone had found out he had signed for the Union and they wanted him to go to the Board and say that he had been harassed by Headley. Headley then went to see Boyd who told Headley that he was going to receive a subpoena to go to Court and testify that Headley had harassed him. Boyd stated he couldn't do that because Headley had not harassed him. Boyd also said "I want to keep all my friends, but my friends are going to be mad at me – they are mad anyway". Headley further testified that he visited with Willson on virtually a daily basis as they had common interests in "Armed Forces, football, sports, girls" but never discussed Gallery matters, and that they had never talked about the petition but that Willson "knew how I felt. He knew last year I had the petition in my hand. A lot of rumours go around the Gallery".

30. A question for the Board is whether Boyd's testimony is to be accepted as to the circumstances surrounding his signing of a withdrawal letter, or whether, as is argued by the objectors, the reply evidence of Headley to the effect that the incident could not have occurred in that manner because of Headley's practice of carrying his supply of withdrawal forms on his person which would have precluded any likelihood that he would have had to go and get some forms and then return to secure Boyd's signature. On this point the Board notes that Hough testified that when he secured a withdrawal form from Headley, Headley took that form from a duffel bag which he carried to and from work. The Board also notes that Headley in his evidence in chief relating to the custody of these forms made no mention that there was a time after which he exclusively carried the forms on his person: his testimony was, "I kept them in my pocket or locked up downstairs or in my briefcase. Not out of my possession. I brought them to the Board on July 18th."

31. In respect to the general attack on Boyd's credibility because of the telephone

conversation between him and Headley, the Board interprets this conversation as meaning that Boyd intended to come to the Board and tell the truth even though it might cost him friends, and we find no basis to conclude that he did otherwise. On the basis of all the evidence the Board accepts Boyd's evidence where it is in conflict with that of Headley.

32. The application for certification was filed with the Board on July 16th and the Board's Form 5 Notice to Employees of such application posted on the Art Gallery premises at 4:00 p.m. on July 17th. On July 18th Headley hand-delivered to, and filed with, the Board 9 letters of withdrawal; two letters of withdrawal came into existence on July 23rd and were filed with the Board along with the petition document (which we shall deal with later) containing 59 names on July 23rd at 2:44 p.m. The circumstances surrounding these latter two letters of withdrawal were as follows.

33. Schilling was a subpoenaed witness in connection with a Board hearing into a Section 79 complaint on Friday, July 20, 1979. Headley testified that on Monday, July 23rd around 12:50 p.m. Schilling approached him and told Headley he wanted to get out of the union and that he wanted to withdraw his statement about Jack Willson "because Rick Gold had put him up to it". Headley made phone inquiries at the Labour Relations Board and explained that Schilling was "upset and didn't want to come back". Schilling, in response to a question from Headley as to what had gone on, stated, he just wanted to get out of everything and that "I went in there and all of a sudden this guy starts writing things down". In any event Headley gave him a withdrawal form and he signed it, and at the same time signed the petition.

34. Headley testified that Patsy Pelletier who signed both a withdrawal form and the petition came to him about 8:05 a.m. on July 23rd as a result of Headley having spoken to Pelletier's girl friend on July 21st and asking her to tell Pelletier he wished to see her. Headley states that at some time he had been told by Willson of a missing credit card while having coffee with Willson in his office at 7:45 a.m. one morning and that when he saw Pelletier coming, he then left and was not present at any ensuing conversation between Willson and Pelletier. Headley states that on July 23rd Pelletier opened the conversation with, "I want to sign the petition", and when asked if she had signed a union card she said "I like to withdraw from the Union also".

35. In respect to the origination and circulation of the petition, Headley testified that he had a discussion with Charlie Simmons, a carpenter who reports to a Miss Margaret Mac-hall and asked Simmons what he thought about preparing a petition, and Simmons expressed himself as, "If the other party can get names, why can't we?" Headley had some weeks earlier discussed the organizing campaign with Simmons because Simmons was the one who had got rid of a union at the Gallery a couple of years ago. On July 23rd Headley was on his way out to make a delivery when he asked one, Ivan McMillan in the Shipping Department (Headley identifies him as Traffic Manager) if he would type it up for him, which McMillan did. McMillan refused an invitation to sign it on the basis that he hadn't signed for the others and wasn't going to sign for Headley. Headley then was then off the premises between 10:30-11:45 a.m. and started to secure signatures about 12:00-12:15 p.m. The first signature was his own and the second signature was that of an employee in Headley's department.

36. The third signature is that of Charlie Simmons which is identified as P.8, and there

is a conflict between his evidence and that of Headley as to when that signature was affixed. Headley, in chief, testified that on July 19th he wanted to take the petition over to his department and get support, which Simmons did and returned it to Headley about 3:00 p.m. the same day with no additional signatures on it. Simmons' testimony is that while he could not fix a date when the petition was in his possession, he was quite positive that it was around 10:00 in the morning and uses as a memory reference point the fact that he took the petition up to the cafeteria where all the girls were on coffee break, held up the petition, asked if they wanted to sign, received a negative response and left. Simmons points out that it is only at the morning coffee break that the girls are all together and that it could not have been at an afternoon coffee break because the girls take staggered breaks in the afternoon. Simmons also stated that he returned to his shop from the cafeteria, gave the petition to Headley and then went on his way. Headley, in cross-examination, admitted he could be wrong about the time when he gave the petition to Simmons and, at another stage that he couldn't really recall what time he gave the petition to Simmons. He tends to corroborate Simmons' evidence when he testified, "Yes, I left the petition with him for a little time and I think as a matter of fact I waited in that little room till he came back". The Board concluded that Simmons was in possession of the petition during the morning coffee break and since the petition was not in existence until after the morning coffee break on July 19th that the date of his possession must have been July 20th, and that at the time of his possession there were then 3 signatures on the petition.

37. On Saturday, July 21st Headley secured two signatures, and on Monday, July 23rd four signatures were secured prior to the start of work between 6:45 a.m. or 7:00 a.m. and 8:00 a.m. and six signatures were secured after the start of work (three of which were during Headley's lunch hour). The Board therefore concludes that 44 of the 59 signatures were secured on July 20th.

38. On July 20th Headley states that he went upstairs to get signatures, went into the office of Joyce Rowland, Acting Assistant Director to ask her what her position was and if she would support the petition. Rowland said "No" and Headley left. Later, at 3:30 p.m. that day Headley returned a phone call from Rowland who then told him that "just want to warn you same thing goes as for other people. No soliciting on Gallery time". Headley states he said "OK" and it was then he decided to come in on Saturday to secure signatures. Headley states he was not aware that the time of his contact of Rowland that she was managerial. Stratton, in his evidence, states that Rowland's office is right next door to the office of the Director and that she was clearly a member of management. Rowland had previously been Co-ordinator of Volunteer Services and was promoted to her present position some time in March which resulted ultimately in Stratton being hired March 28th. Stratton states that since that date Rowland has accepted her present office. Headley in cross-examination stated that Rowland's office was not next to that of the Director and not in that area but was down in the volunteer area. When Stratton was asked in cross-examination whether he had asked Rowland to sign the document that he had prepared, his response was "No. It stated clearly on the Green Sheet who was eligible."

39. On July 23rd, a good deal of Headley's time was occupied by the petition and petition-related. At some time on this day it is obvious that he picked up the covering letter to the petition which was dated July 23rd and which was typed by Norma Elms, a secretary in the Audio-Visual Department. Headley could not recall when he had given the letter to Elms for typing and speculated that it could have been that morning or on the preceding Fri-

day. Headley testified that about 10:00 a.m. he was spoken to by Mr. Grant, Director of Administration, who told him, "I understand a petition is going. Just want to warn you, no solicitation on company time. Same goes for the other side". Headley states he responded "Fine" and left Grant's office. We accept the evidence of Gold that Headley was in Willsons's office at 10:30 a.m. and at 11:30 a.m. but make no inference as to the purpose of his presence. According to Headley, he was out of the Gallery on a delivery for some period returning to the Gallery around 12:00 noon. At that time he went upstairs to secure more signatures, ran into Stratton and collected his petition, learned that Albert Schilling was looking for him and met Naster in the hallway where they talked at Headley's invitation for 10-15 minutes and then moved into Naster's office, and based on Naster's evidence spent, all told, 45 minutes with Naster. Following this conversation Headley went out of the Gallery for his lunch, secured one signature for the petition while out of the Gallery, went back into Gallery and secured a signature, returned outside and secured another signature, ate his lunch and returned to the Gallery and talked with Albert Schilling, including phoning the Labour Relations Board to secure information on Schilling's behalf, secured Schilling's signature to the withdrawal letter and to the petition and secured one other signature to the petition. He was then out of the Gallery for some period attending at the Labour Relations Board to file the petition documents which are time-stamped "2.44 p.m. July 23rd".

40. Richard Naster has been Acting Administrator of the Gallery Shop since July 1, 1979 having previously been employed as Buyer. As such he states he reports directly to Grant, makes recommendations as to size of complement (presently varying between 6-7 persons), schedules work and makes sure work is completed and that the shop runs smoothly. There is a dispute between the parties as to whether this position should be included in the bargaining unit, which the respondent opposes on managerial grounds. When asked if he was aware how long he would be in an "acting" capacity his response was that his status was very much up in the air, that he had applied for the job and things are still being discussed but that he had received a salary increase when he assumed the "acting" role.

41. Naster states that he was standing in the corridor adjoining the Gallery Shop around noon hour of July 23rd when he was approached by Headley who asked if they could talk for a few minutes, to which Naster assented. Headley stated that there was a petition in opposition to the Union and Naster indicated that fact to be of some interests to him. Headley then showed him two different papers one of which was in opposition to the Union and the other a withdrawal form. Naster states this was his first knowledge of the existence of a petition. They spent 10-15 minutes discussing a few things in the hallway which Naster describes as well-travelled with half a dozen people per minute going by. They then withdrew to Naster's office which is in the general area. Discussions continued in the office for another 30-35 minutes and consisted mainly of Naster exploring different points regarding the union and the petition and with Headley at some stage spending some 15 minutes in a "less than complimentary discussion of two members of the organizing committee" to which Naster expressed himself as "greatly surprised". Naster states he had had no previous conversation with Headley.

42. The question to be determined by the Board is whether the documentary evidence before it in the form of withdrawal letters and the petition represents the voluntary expression of opposition to the applicant's certification by the employees who signed such documents.

43. The Board's practice in regard to "statements of desire" or "petitions" is well set out in the case of *Peacock Lumber Ltd.*, [1979] OLRB Rep. May 423 where the Board, at paragraph 7 says:

"Neither "statements of desire" nor "petitions" are mentioned in the The Labour Relations Act itself, but they do appear to be contemplated by Rule 48 of the Rules of Practice (R.R.O. 1970 Reg. 551 as amended). The Board has a long-standing history of accepting such petitions and exercising its discretion to order a representation vote where the petition is voluntary, complies with Rule 48, and contains the signatures of a sufficient number of persons who have previously signed membership cards, that there is some doubt whether the union's "members" continue to support its certification ..."

In that same decision, the Board at paragraph 8 says:

"Rule 48 casts upon the petitioners an onus to call evidence as is prescribed by 48(5) and to generally demonstrate that the petition is voluntary. The Board must be satisfied that when the members signed the petition, they were evidencing a genuine change of heart and were not motivated by a concern that their failure to sign would be communicated to the employer, or could result in reprisals. It must be clear that the circulation of a petition is free from actual, or perceived, influence of management ..."

In respect to the voluntariness of statements of desire reference is made to *Radio Shack*, [1978] OLRB Rep. Nov. 1043 at paragraph 24 where the Board said:

"24. The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the "sudden change of heart" by those who have signed for the union and shortly thereafter repudiated the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board's approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC ¶16,264 in the following terms:

"In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board

has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.”

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evidence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd. and Canadian Paperworkers Union*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.”

44. The evidence establishes that the campaign of opposition to the union’s certification (save for the opposition organized by Brian Stratton) was originated by Headley and consisted of soliciting withdrawal letters commenced before the actual filing of the certification, and soliciting of signatures to the petition subsequent to the filing of the certification application.

45. In the implementation of the campaign, Mr. J. B. Willson, Supervisor of Maintenance, evinced interest and participation. The evidence shows Willson to have been clearly a representative of management and that “everyone knew” where he stood in being opposed to the union. This knowledge apparently flowed from Willson’s position in a previous union organizational campaign and is further enhanced by his willingness to expound on his views, with or without invitation, for the purposes of persuading employees to adopt his views, such as the pre-work boiler room discussion between himself and Maintenance Department employees of July 12th. The evidence also establishes that there was an obvious personal relationship between Willson and Headley. The impact of Willson’s activities is clear in respect to the signing of withdrawal letters by both Hough and Boyd.

46. Aside from Willson’s activities vis-a-vis Boyd, we find it more than coincidence that Hough who had been a known union supporter in the previous organizational campaign, and who was also a union supporter in the current campaign, should, a few hours following Willson’s comments about the union on July 12th, seek out Headley and request a withdrawal form. Hough states he had decided that since he intended to leave the employ of the respondent his “vote” should not count one way or the other. In our view the inference should be drawn that this action was triggered by Willson’s comments for reasons best stated in the leading case of *Pigott Motors (1961) Ltd.* 63 CLLC ¶16,264 as,

“... In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously

vulnerable to influence, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act . . .”

47. Willson had a deeper involvement in bringing about Boyd's letter of withdrawal. The evidence is that Willson approached Boyd on two occasions. On the first occasion he ascertained that Boyd had signed a union card and there apparently was some discussion about withdrawal as Boyd states that he then told Willson, in order to “protect” himself, that he had been in touch with the Labour Relations Board and ascertained that he could not withdraw. It was on the second occasion during the cafeteria discussion that Willson returned to the topic to tell Boyd that he could indeed withdraw his union card if he wanted, and it was on this occasion that Willson asked Headley, who had come in during the discussion if Headley had “whatever it was that Boyd had to sign”. Boyd's statement as to why he signed the withdrawal letter is not without significance when he explained that it was “so management would have my name down as being against the union”. The Board can only conclude that the interest and activities of Willson destroyed any likelihood that Boyd's subsequent signing of a withdrawal letter was a voluntary expression of his wishes.

48. The petition document and the withdrawal letters are so intertwined that they must be considered as an integrated whole. The Board has noted that 7 of the persons who signed withdrawal letters also signed the petition and included in that seven are Hough and Boyd. There is Boyd's evidence that he signed the petition for the same reason as he signed the withdrawal letter, namely, “so management would have my name down as being against the union”. The doubt which is cast on the withdrawal letters as being a voluntary expression of the wishes of the signatories thus flows through and equally casts a similar doubt in respect of the petition's voluntariness. This doubt in respect to the voluntary nature of the petition is fortified by the cumulative impact of Headley's activities on July 20th and 23rd, on which days an inordinate amount of Headley's work time must have been consumed in petition-related activities. It is clear that Headley did receive a caution from Miss Rowland, a representative of management to the effect that “just want to warn you. Same thing goes as for other people. No soliciting on Gallery time”. However, this warning came later in the day of July 20th and consequently was unlikely to have much influenced Headley's total activities. It must also be noted that the warning was issued some time after Rowland had been made aware of Headley's activities by his solicitation of her support. A free hand to use working time to secure employee opposition to a trade union has the effect of conveying managerial support for the activity.

49. It is also noted that Headley on the next work day, July 23rd, was called to the office of Mr. Grant, Director of Administration, about 10:00 a.m. and issued a caution similar to that received from Rowland. In respect to Headley's activities between 12:00 noon and 2:44 p.m. that day when he filed the petition at the Board's office, it must be concluded that the cautions he had received were breached. More important than whether or not the cautions in fact failed to be abided by is whether by openly exercising such wide freedom to utilize work time for petition-related activities it did not create a perception in employees that his activities had, in fact, the tacit approval of the employer and that employees were therefore “motivated by a concern that their failure to sign would be communicated to the employer”. We think that in the context of Headley's known close association with Willson, a representative of management whose anti-union views were generally known, together with Headley's devotion of a large proportion of what would normally be work time to the petition and related activities, the inference should be drawn that Headley's activities of

July 20th and 23rd would be seen by employees to have the tacit approval of the employer. The employee responses he obtained cannot, therefore, be relied upon by this Board as constituting a voluntary expression of their wishes.

50. Based on all the evidence before us and independent of any evidence given by Albert Schilling, the Board concludes that the objectors have failed to discharge the onus of establishing the voluntariness of the statements of desire as expressions of the wishes of the employees concerned. The Board therefore affirms its decision of November 29, 1979.

0741-79-U William M. Pipher, Complainant, v. Atlantic Bus Lines Inc., Respondent.

Discharge for Union Activity – New employer discharging grievor – Board satisfied employer not aware of grievor's union activity – No anti-union motivation established

BEFORE: M. G. Picher, Vice-Chairman, and Board Members F. W. Murray and D. B. Archer.

APPEARANCES: *Harry Kopyto for the complainant; R. C. Filion for the respondent.*

DECISION OF THE BOARD; February 18, 1980

1. This is a complaint under section 79 of *The Labour Relations Act*. The complainant, William M. Pipher, alleges that he was discharged by the respondent because of his union organizing activity among its employees. He maintains that his termination was in contravention of sections 56, 58 and 61 of *The Labour Relations Act* and requests reinstatement with compensation for wages and benefits lost.

2. The respondent operates a bus transportation company. On June 19, 1979 it entered into a contract with the Toronto Transit Commission (hereinafter the T.T.C.) in Metropolitan Toronto. As part of its arrangement with the T.T.C. the respondent took over the franchise as well as the specially-equipped mini-buses of Wheelchair Mobile Services Limited, the company which had previously operated that service.

3. The grievor had worked for just over a year as an employee of Wheelchair Mobile Services Limited. With the transfer of the business he became employed by the respondent, along with a number of his co-workers. The transfer was not without incident. It appears that Wheelchair Mobile Services Limited lost its contract with T.T.C. in circumstances of its own severe financial difficulty. Pay cheques which it had issued were dishonoured and some employees were not given their statutory severance pay. The employees, led by an *ad hoc* committee which included the grievor, retained counsel and explored various means of recovering their lost wages. Their efforts included overtures to the T.T.C. and to their new employer, the respondent, to see what, if anything, could be done. It appears that some civil litigation is either contemplated or under way as a result of the committee's efforts to recover for the employees monies owing from Wheelchair Mobile Services Limited.

4. One product of the deliberations of the *ad hoc* committee was discussion of the possibility of forming a union to avoid similar problems in the future. To that end the grievor undertook to meet with Mr. Charles B. Johnson, President of Local 113 of the Amalgamated Transit Union, the bargaining agent of transit employees of the T.T.C. The evidence establishes that Mr. Pipher favoured and prompted the idea of union representation among the members of the *ad hoc* committee. As a result of his encounter with Mr. Johnson, meetings between the employees of the respondent and officials of the Amalgamated Transit Union were held in a church hall on June 28, 1979 and at the King Edward Hotel in Toronto on July 11, 1979.

5. The grievor was discharged before either of those meetings took place and, indeed, prior to the time when any substantial union campaign among the employees had started. His discharge on June 26, 1979 followed a number of untoward incidents between himself and his new employer.

6. Mr. D. A. Hailey, president of the respondent gave extensive evidence respecting the circumstances of Mr. Pipher's discharge. He testified that upon taking over the wheelchair transportation business he determined to tighten up its operations and eliminate what he viewed as the unduly lax employment practices of his predecessor. According to Mr. Hailey's testimony the grievor came to his attention very quickly. One June 19, 1979, the first day after the respondent took over the wheelchair transportation service, Mr. Pipher was late to work and a dispatcher was obliged to cover his run. The next day, June 20th, Mr. Hailey entered the respondent's dispatching offices at Markham to find Mr. Pipher and another employee complaining to a dispatcher on duty about certain aspects of the company's operations and, according to Mr. Hailey, doing so in such a way as to interfere with the dispatcher's ability to perform his work. Mr. Hailey then told the two employees to leave the office and gas up their vehicles, adding that if they had anything to say they could take it up with him later. According to his testimony Mr. Pipher then lectured him on the cost of requiring drivers to collect their vehicles at Markham as opposed to using a more central depot or allowing employees to keep their buses at home. While Mr. Pipher's account of the incident differs somewhat, the evidence was clear that it was a negative encounter and that from that time on there was no love lost between them.

7. Mr. Hailey's next encounter with the grievor was on June 25, 1979. That morning he noticed Mr. Pipher leaving the respondent's yard driving a bus with defective brake lights. He regarded this as a serious breach of the employee's responsibility and immediately notified the dispatcher concerned. The evidence establishes that as part of the daily routine a driver is required to do a safety check of his vehicle and make a written report of any defect on a safety check list for that purpose. Mr. Hailey testified that while any public transport vehicles must be roadworthy there must be even greater concern for the safety and roadworthiness of vehicles used to transport the handicapped. The degree of damage must be considerably higher in the event of a rear end collision involving a vehicle whose passengers are in wheelchairs. The Board must accept Mr. Hailey's testimony that the grievor's failure to properly check his vehicle before leaving the yard did constitute a breach of his responsibilities that would give his employer cause for concern. Clearly that incident did little to improve Mr. Pipher's already doubtful image in the eyes of his new employer.

8. The culminating incident came the next day. The evidence establishes that Mr. Pipher's performance caused Mr. Hailey to inquire of David Reiner about his work record.

Mr. Reiner, who had been the Operations Manager for the predecessor employer and continued in that capacity under Mr. Hailey, advised him that the grievor's work record was extremely poor. In this regard the Board accepts the evidence of Mr. Reiner that Mr. Pipher was frequently late in coming to work and starting his route; in a period of just over a year he had been late on some thirty to forty occasions, a record which caused some discontent among fellow employees who were required to cover for him. While punctuality is important in any job it is especially critical in the pick-up and transportation of passengers on a pre-established schedule. If one of the respondent's drivers is late in starting his route there is dislocation not only to the respondent but to the handicapped passengers awaiting transportation to their work as well as dislocation to the passengers' employers or clients. On the morning of June 26th Mr. Pipher's first scheduled pick up was at 7:10 a.m. Because he had the bus at home with him from the previous evening it was his responsibility to report to the dispatcher some thirty to forty-five minutes prior to his first call. That morning he did not call in. When the dispatcher attempted to contact him at home he was unable to reach Mr. Pipher. He had in fact spent the night elsewhere without leaving an alternate phone number where the company could reach him. When he finally called in at approximately 8:00 a.m. he was instructed to come to the office and return the bus. While Mr. Pipher's evidence differs slightly as to the precise times involved, he admits that knew he was in serious trouble. In this regard the Board accepts the evidence of Mr. Reiner that when Mr. Pipher arrived at the office at about 10:00 a.m. his first comment to Mr. Reiner was: "I guess I blew it".

9. Shortly thereafter the grievor reported to Mr. Hailey's office. Mr. Hailey asked Mr. Pipher whether he had yet detected the faulty brake lights. According to Mr. Hailey when Pipher responded that he had not, his concern for the grievor's safety practices was compounded. When Hailey asked for an explanation as to why Mr. Pipher had not called in on time none was forthcoming. Mr. Hailey then informed the grievor that he was terminated and that the reasons for his termination were his interference with the dispatcher, his failure to keep an adequate safety check of his vehicle and his record of lateness culminating in the incident of that day.

10. The burden of proof in a section 79 complaint is upon the employer. Notwithstanding where the burden may lie, to make a finding against a respondent the Board must be satisfied that two elements are made out: first, it must be established that the employer knew or believed that the employee was engaged in union activity or support; second, it must be shown that the employer's knowledge or belief in that regard was at least part of the motivation for the discharge of the employee. (See, *Regina v. Bushnell Communications Ltd.*, [1973] 1 O.R. (2d) 442 (H.Ct.) upheld, 77 CLLC ¶14,111 (C.A.)); *Pop Shoppe (Toronto) Limited* [1976] OLRB Rep. June 294; *Barrie Examiner* [1975] OLRB Rep. Oct. 745; *Fielding Lumber* [1975] OLRB Rep. Sept. 665).

11. We deal firstly with whether Mr. Hailey had any knowledge of the grievor's union activity. On the day he was discharged Mr. Pipher had worked for Mr. Hailey for only seven days. During that time the entire extent of his union activity was contacting Mr. Johnson of the Amalgamated Transit Union and arranging for a meeting between Mr. Johnson and the employees. There is simply no evidence to indicate that Mr. Hailey knew, or had reason to know in that short period of time, that Mr. Pipher was exploring the possibility of a union among the employees. The Board accepts the evidence of Mr. Reiner, a member of the respondent's management, that while he was aware that Mr. Pipher was attempting to contact the union Mr. Reiner did not pass that knowledge on to Mr. Hailey. It appears that Mr.

Reiner also stood to gain by anything that a union could do about the unpaid wages of Wheelchair Mobile Services Limited.

12. The Board is not here presented with evidence of an extended union membership campaign in which the grievor was widely known as a prime mover. The evidence establishes that during the week in question only the three or four members of the *ad hoc* committee and a limited number of employees had knowledge of Mr. Pipher's intention to contact a union. It would appear that very few people, much less the employer in the person of Mr. Hailey, had any knowledge of his activities in that regard.

13. Sometimes the very circumstances of a discharge can raise adverse inferences as to the knowledge and motivation behind an employer's dealing with an individual. That is especially true when an employee's discharge seems unduly harsh, discriminatory or unusual in all of the circumstances. Adverse inferences may also be drawn when an employee's discharge is situated against a background that discloses a consistent pattern of anti-union activity on the part of an employer. (Cf. *The Barrie Examiner*, *supra*). None of these signs are present in the instant case.

14. During his seven days of employment with the respondent the grievor amassed an unenviable record, particularly vis-a-vis a new employer determined to turn a faltering business around and establish new standards of efficiency and responsibility among its employees. Within a seven day period Mr. Pipher was involved in at least four incidents that would justify some form of discipline. There is no suggestion on the evidence that other employees behaved comparably or that he was singled out for special treatment. The culminating incident, the grievor's failure to report for work at all, is especially serious given both the nature of the respondent's business and the grievor's past performance in this regard. Bearing in mind that this is not an arbitration of rights under a collective agreement, there was nothing to prevent Mr. Hailey from taking into account the grievor's prior record with the predecessor employer.

15. It is clear from Mr. Pipher's own evidence that he did not, at the time of his discharge, believe that he was being fired because of his union activity. While that is not of itself fatal to the complaint, it tends to affirm the plausibility of the respondent's position that Pipher's termination was purely disciplinary. He was an employee, already on thin ice, who committed one last serious blunder. Indeed, this complaint was not filed until almost a month after Mr. Pipher's discharge. The Board is inclined to agree with Mr. Pipher's conclusion, expressed in his own evidence, that he gave his employer ample reason to fire him. Accepting as we do that Mr. Hailey had no knowledge of Mr. Pipher's union activity we must conclude, on the whole of the evidence, that Mr. Pipher was the subject of a disciplinary discharge, and nothing more.

16. For the foregoing reasons the complaint is therefore dismissed.

0769-79-R Printing Specialties & Paper Products Union Local 701, London, Ontario, Applicant, v. **Atlantic Packaging Products Ltd.**, Respondent, v. Canadian Paperworkers Union, Intervener #1, v. Canadian Chemical Workers Union, Intervener #2.

Build-Up – Certification – Reconsideration – Representation Vote – Board certifying applicant – Intervener subsequently coming forward alleging build-up imminent at time of certification – Whether Board reconsidering certificate – Vote ordered

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members O. Hodges and F.W. Murray.

APPEARANCES: *C.M. Mitchell and J. Eliot for the applicant; S.C. Bernardo and John Cherry for the respondent; Douglas J. Wray and G. Bucella for intervener #1; S.M. Grant and Paul Roelfsen for intervener #2.*

DECISION OF THE BOARD; February 27, 1980

1. In a decision dated August 24, 1979 the Board certified the applicant trade union as bargaining agent for all employees of the respondent located at Ingersoll, Ontario save and except foremen, persons above the rank of foreman, office staff and sales staff. The employer, although served with proper notice, did not appear at the certification hearing. The documents filed by the respondent with its reply shows two employees working within the bargaining unit as of July 25, 1979; the date of application. The applicant submitted membership evidence on behalf of both employees falling within the unit and accordingly, the Board certified the applicant without a vote by the above referred to decision of August 24, 1979.

2. On October 10, 1979 the Canadian Paperworkers Union filed an application for certification in respect of essentially the same group of employees for which the Printing Specialties and Paper Products Union, Local 701 (the applicant in this matter) had been certified on August 24, 1979. The Printing Specialties and Paper Products Union intervened in that application and argued at the hearing that the certificate issued to it on August 24th served to bar the Canadian Paperworkers Union's application. The Canadian Paperworkers Union argued in reply that the August 24th certificate was issued at a time when there was not a representative number of employees in the bargaining unit; that is during a period of build-up. The Canadian Paperworkers Union, therefore, sought to have the Board:

“Reconsider its earlier decision issuing a certificate to the Printing Specialties and Paper Products Union, Local 701, pursuant to *Section 95(1)* of the *Labour Relations Act*, and either revoke the earlier Certificate, or in the alternative, order a representation vote.”

The panel of the Board seized with the application for certification filed by the Canadian Paperworkers Union (a different panel than this panel which certified the Printing Specialties Union in August) dealt with the Canadian Paperworkers Union's request for reconsideration of the Board's decision certifying the Printing Specialties Union in a decision dated November 9, 1979 as follows:

“Since the certificate issued by the Board to the intervener of August 24th, 1979 poses a bar to this application and, since the applicant’s request that the Board’s decision be reconsidered is a matter which should be determined by the panel that issued the decision, the Board decided to adjourn these proceedings in respect of all matters therein so that the applicant’s request for reconsideration could be determined by the other panel. This panel of the Board makes no recommendation as to the consolidation of any of the matters referred to in the representations of the parties.”

3. This panel of the Board, which certified the Printing Specialties Union on August 24, 1979, convened a hearing on December 11, 1979 for the purposes of entertaining the request of the Canadian Paperworkers Union that the Board reconsider its earlier decision pursuant to Section 95(1) of the Act. The Canadian Chemical Workers Union also appeared at the December 11th hearing for the purpose of intervening in the proceedings. Counsel for the Canadian Chemical Workers Union advised that he sought to intervene for the purposes of dealing with the “build-up”. The Printing Specialties Union and the respondent company challenged the status of both the Canadian Paperworkers Union and the Canadian Chemical Workers Union to intervene following the issuance of a certificate for the purpose of asking the Board to reconsider the granting of the certificate.

4. In a decision dated January 4, 1980 the Board accorded both the Canadian Paperworkers Union and the Canadian Chemical Workers union intervener status for the purpose of seeking reconsideration of the Board’s decision of August 24, 1979 certifying the applicant trade union. Both interveners take the position that the Board certified the applicant on the basis of membership support amongst an unrepresentative number of employees.

5. The facts in this matter are not in dispute and may be summarized as follows:

- The company constructed a new plant in Ingersoll and commenced to make it ready for production in the summer of 1979.
- At the time of the instant application for certification the respondent had two (2) employees working at its new plant in Ingersoll. Neither was engaged in production work although both were scheduled to become engaged in production work.
- The applicant applied for certification of July 25, 1979 and was certified on the basis of membership support from the two employees then working.
- Production has since commenced at the new plant and the number of employees has increased from 2 as of July 25th to 15 as of October 10, 1979, the date of the application filed by the Canadian Paperworkers Union.
- There are presently 18 employees working at the Ingersoll plant. They work two operating shifts of eight hours each, four days per week.
- The applicant trade union served notice to bargain on the respondent company by letter dated September 20, 1979. The letter reads:

"This letter will give notice of our intent to negotiate a new agreement for your new Ingersoll Plant.

I have called to the members employed at this plant and they have told me that this plant is now receiving new equipment and is in the process of hiring new employees.

We as a union feel that until this plant is made more operational it would be premature at this time to enter into negotiations until you have made it such.

Would you please direct any correspondence to me regarding this plant in the future as I will be negotiating the contract and handling all its affairs until we have a collective contract."

- The company replied to the union by letter dated September 28, 1979. The letter reads:

"Concerning your letter of September 20th, 1979, we recognize your intent to negotiate a new agreement for our Ingersoll Plant, and agree with your viewpoint that at this time it would be premature to enter into negotiations until we have completed our machinery installations and have assigned job responsibilities.

Based on this and our current schedule, I would estimate that this would put us in a position to commence negotiations during the first week of November, 1979."

- In the face of these reconsideration proceedings the applicant union and the respondent company have not commenced to bargain a collective agreement.
- The company has purchased machinery which will require the addition of 4 employees when the machinery is installed.

6. The Canadian Paperworkers Union, relying on the Board's decision in *Domco Foodservices Limited*, Board File 1014-79-R, October 3, 1979, [1979] OLRB Rep. Oct. 937, and January 2, 1980, and in particular paragraph 7 of the January 2, 1980 decision, argues that the build-up principle applies in the circumstances of this case and must cause the Board to exercise its powers of reconsideration under section 95(1) of the Act, revoke the certificate issued to the applicant in August and direct the taking of a representation vote as it would have done if it had been aware of the "build-up" in August. The Canadian Paperworkers Union maintains that the criteria for "build-up" that is, a real likelihood of a significant build-up in the work force within a reasonable period of time, are established on the evidence and when reference is had to the exchange of correspondence between the applicant and the respondent in respect of the commencement of bargaining, the Board must revoke the certificate and direct the taking of a representation vote. The Canadian Chemical Workers Union adopted the argument of the Canadian Paperworkers Union and in addition, maintained that there exists a positive onus upon the parties to an application for certification to advise the Board of a potential build-up.

7. The applicant takes the position that there is no positive onus on the parties to an application for certification to advise the Board of a potential build-up. The applicant relies on the absence of any rule or regulation which requires the information to be brought forward. The applicant maintains that the Board doesn't know what information it would have had before it six months ago and cannot ascertain, therefore, what it would have done six months ago. The applicant argues it was the "early bird" and has relied on the certificate at least to the extent that it stopped organizing after its issuance and maintains that absent these proceedings it would have commenced to bargain in November; within the time limits set down in the Act. The applicant distinguishes the *Domco* case on the grounds that the Board was not required to reconsider an outstanding certificate in that case as it is being urged to do in this case and as it has done in no other case involving an alleged build-up.

8. The Board will defer certification of a trade union where there is a planned build-up of the work force such that a representative segment of the planned work force is not employed as of the date of the application. The rationale in support of deferral is based upon an acknowledgement of the right of those employees who will be hired as part of the planned build-up to take part in the selection of a bargaining agent. Certain conditions must be met, however, before the Board will impinge upon the right of the present employees to engage in collective bargaining. These are: (1) the present employees do not constitute a representative segment of the work force to be employed; generally the Board considers fifty per cent of the projected work force in a representative number of the classifications required to operate the plant as constituting a representative segment of employees for the purpose of certification; (2) the "build-up" is planned to take place within a reasonable period and (3) the "build-up" does not depend upon factors which are beyond the control of the employer, such as market conditions. (See *Emil Frant and Peter Waselovich*, 57 CLLC ¶18,057, *Wix Corporation Ltd.* [1975] OLRB Rep. Aug. 637 and the cases cited therein.) In cases where the above conditions are met the Board will direct the taking of a representation vote when a representative number of employees are within the bargaining unit.

9. The statutory basis for the application of the "build-up" principle as described above is found in section 7 of the Act. Section 7(1) of the Act allows the Board to direct the taking of a representation vote even if satisfied on the membership evidence that more than fifty-five per cent of the employees in the bargaining unit as of the date of application are members of the trade union. The practice of the Board, in other than the construction industry, even when satisfied that more than fifty-five per cent of the employees in the bargaining unit are members of the trade union on the date of application, is to hold a representation vote where the conditions necessary to establish a build-up exist. In the face of the statutory scheme to establish a system of labour relations based on majority rule and in the absence of any direction to the Board to disregard any planned increase in the number of employees in the bargaining unit, as appears in the construction industry sections of the Act, the Board takes planned build-up into account in exercising its discretion under section 7(1) whether to certify outright or direct the taking of a representation vote. Section 108(2) of the construction industry provisions of the Act expressly directs the Board "not [to] have regard to any increase in the number of employees in the bargaining unit after the application is made" when processing a construction industry application for certification. Rule 43(a) of the Board's Rules of Procedure allows the Board to settle the list of employees to be used for the purpose of any vote and Rule 43(c) allows the Board to settle the date of the taking of any vote. If the conditions precedent to a planned "build-up" exist, the Board will exercise its discretion to conduct a representation vote as of the time that a representative number of

employees are within the bargaining unit so as to satisfy itself that a majority of those in the unit desire to be represented by the applicant trade union. The practice of the Board is consistent with the scheme of employee choice and majority representation as established under the Act and flows from a legitimate exercise of the discretion given the Board to hold representation votes.

10. In most of the cases in which the Board has applied the build-up principle the matter has been raised by the employer party to the application. As far back as 1965, however, the Board raised the matter on its own motion. (See *The McCord Corporation* [1965] OLRB Rep. June 203. In the recent *Domco* case, *supra*, a union seeking intervener status in an application for certification raised the issue of build-up. The Board refused to grant intervener status and neither the respondent nor the applicant argued build-up. Nevertheless the Board refused to certify and in calling the parties back for evidence on the point commented:

“At the hearing the Board took no issue with the agreement of the parties that the number of employees was sufficiently representative. Upon further consideration however, we have some concern. In an application for certification where one of the parties has put the Board on notice that a substantial build-up of the work force is likely the Board must, quite apart from any agreement of the parties, satisfy itself that the certificate it issues is based on the wishes of a number of employees who are sufficiently representative of the employees who will eventually comprise the bargaining unit. In this case if the respondent’s representations are borne out by direct evidence, the Board would have some difficulty accepting that nine employees are a substantial and representative sampling of a work force that is expected to increase to 35 within a matter of weeks.”

The Board satisfied itself that the conditions precedent to a build-up existed in that case and in response to the concern that there is no express requirement to inform the Board of a potential build-up stated at paragraph 7:

“Admittedly, neither the Board’s form for a union’s application for certification nor the employer’s reply form contains any question which specifically solicits information about a possible build-up of the bargaining unit. Nor does the Board of its own motion normally make such inquiries at certification hearings. That is not to say, however, that the Board will not do so in appropriate circumstances, nor that it will hesitate to reconsider a certification if it should subsequently be disclosed that at the time of the application, whether by ignorance or by design, the parties failed to advise the Board of an impending build-up of which they both had knowledge. The Board therefore expects the parties before it in certification proceedings to bring all pertinent information to the Board’s attention with the kind of candour exhibited by counsel for the respondent in this case.”

The requirement of majority support is so fundamental to the operation of the Act and the build-up principle so clearly enunciated in the Board’s jurisprudence that the parties to an

application for certification where a planned build-up of the work force is imminent cannot be heard to say that they are under no obligation to inform the Board of this fact.

11. The evidence in this case establishes that a significant increase in the work force was planned as of the date of the application for certification such that a representative number of employees were not in the employ of the respondent at the time the Board issued the certificate to the applicant. The letters between the parties in respect of the commencement of bargaining amply underscore this finding. The planned build-up was imminent such that we would have not have issued a certificate if we had been advised of the relevant facts in August. Rather, we would have directed the taking of a representation vote at the time as of which a representative number of employees were employed at the plant.

12. Does the fact that we are dealing with the issue through reconsideration distinguish our case from *Domco* as is argued by the applicant. The answer is yes, but only to the extent that we must concern ourselves with the passage of time from the granting of the certificate and weigh the prejudice which might result if we were to amend our original decision or revoke the certificate. Possible prejudice to one side or the other as a result of reconsideration is a proper matter to be considered in determining whether or not to exercise our discretion to direct the taking of a representation vote. In this case, there is no collective agreement in place. Indeed, the parties did not commence to bargain because the plant was not sufficiently operational at the time of certification. If a collective agreement had been negotiated prior to the Board's reconsideration, the Board would have been required to assess the weight to be given to its existence in reconsidering its original decision and may have looked to the time frame established under section 52(1) for challenging voluntary agreements. The Board does not have to enter into these considerations in this case, however, because there is no evidence before us to establish that the applicant would be prejudiced in any way if the Board was to revoke the certificate issued to it on August 24, 1979 and direct the taking of a representation vote.

13. Having regard to all of the foregoing we hereby exercise the authority given us under section 95(1) of the Act and revoke the certificate issued to the applicant on August 24, 1979. Having regard to the evidence now before us which establishes that a representative number of employees were not in the bargaining unit at the time the Board issued the certificate of August 24, 1979 and the further evidence which establishes that a representative number of employees are presently in the bargaining unit, the Board hereby directs the taking of a representation vote. Neither of the interveners would have been entitled to have been shown as a choice on the ballot if the Board had directed the taking of a representation vote in its August 24, 1979 decision. We are now proceeding as we would have proceeded at that time if the relevant information had been put before the Board. Accordingly, the Board directs that all employees of the respondent located at Ingersoll, Ontario, save and except foremen, persons above the rank of foreman, office staff and sales staff on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

14. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

15. The matter is referred to the Registrar.

1957-79-R United Steelworkers of America, Applicant, v. Behlen Wickes Company Limited, Respondent, v. Group of Employees, Objectors.

Certification – Petition – No documentary evidence of opposition filed prior to terminal date – Objecting employees wishing to adduce oral evidence of objection – Board not extending terminal date to permit filing of statement – No basis for ordering representation vote

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: Gerry Reeds for the applicant; Peter Gilchrist for the respondent; Vern Millward, Art Kuyvenhoven, Valent Pevec, John Cicero, Mark Spencer, Rick Shannon, Roy Mullin, Rob Palla, Bryan Watson, Steve L'Ortye and A. Glazebrook for the objectors.

DECISION OF THE BOARD; February 21, 1980

1. This is an application for certification.

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4. At the outset of the hearing, a group of employees sought to intervene in the proceedings for the purpose of expressing their opposition to the applicant trade union. The Board had received no written statement of desire as contemplated by paragraph 4 of the Board's Form 5, "Notice to Employees of Application for Certification and of Hearing". Counsel for the respondent employer then advised the Board that the employer had, the day prior to the hearing, received from employees a written statement in opposition to the applicant. In view of what counsel termed the clear evidence of opposition to the applicant, counsel for the employer requested that the Board either extend the terminal date in this matter to permit filing of the employees' statement, or, in the alternative, to allow the employees to present at the hearing *viva voce* evidence to the same effect. Counsel explained that the respondent had received the Board's documentation giving notice of the application only on the morning of January 23rd and posted it that afternoon. The terminal date was set as January 28th. Particularly since the employees at this plant were not scheduled to work week-ends, counsel argued that they were not given sufficient opportunity to respond to the union's application.

5. The Board ruled at the hearing that it would deny the respondent's request, for the reasons set out below.

6. The Board is given a discretion, pursuant to section 92(2)(j) of the Act, to determine the form in which and the time as of which evidence of objection by employees to certification of a trade union must appear. The Board's policy in that regard, insofar as here material, is contained in Rule 48 of the Board's Regulations and also in paragraphs 4, 5, 6 and 8 of Form 5 ("Notice to Employees"). That portion of the notice reads as follows:

"4. Any employee or group of employees affected by the application and desiring to make representations to the Board in opposition to this application must send to the Board a statement in writing of such desire, which shall,

- (a) contain the return mailing address of the employee or representative of a group of employees;
- (b) contain the name of the employer concerned; and
- (c) be signed by the employee or each member of a group of employees.

5. That statement of desire must be,

- (a) received by the Board not later than the terminal date shown in paragraph 3; or
- (b) if it is mailed by registered mail addressed to the Board at its office, 400 University Avenue, Toronto 2, Ontario, mailed not later than the terminal date shown in paragraph 3.

6. Any statement of desire that does not comply with paragraphs 4 and 5 will not be accepted by the Board.

...

8. No oral evidence of membership in a trade union, or of objection by employees to certification of the applicant will be accepted by the Board except to identify and substantiate such written evidence."

It is clear that the evidence which was sought to be introduced does not meet the above requirements, not having been filed in writing on or before the terminal date of this application. Accordingly, no oral evidence in its place could be adduced before the Board.

7. The only issue, then, was whether the Board should exercise its discretion and extend the terminal date. In limited circumstances the Board has, in the past, done so. In *C.I.P. Victoria Ltd.*, [1979] OLRB Rep. Nov. 1069, for example, the Board extended the terminal date where notice of the application for certification was not posted until 4:00 p.m. on October 16, with a terminal date set for October 18. By contrast, the Board in *Macdonnell Memorial Hospital*, [1979] OLRB Rep. Oct. 996 refused to extend the terminal date of September 28, when notice had been posted by 11:00 a.m. September 26. In the latter case, unlike the present one, no employees appeared at the hearing to raise the question of lack of opportunity. The Board went on to note, however, that it has consistently held in certification matters that three days' actual notice prior to the terminal date is sufficient.

8. In the present case, the employees had some five and one-half days to register their opposition. Little regard can be paid to the fact that two of the days fell on a non-scheduled weekend, since the Board does not in any event promote the employees' workplace as the best possible site for circulation of a statement in opposition to a trade union's bargaining rights. Further, in the *C.I.P. Victoria* case, the employees delivered their statement to the Board on the day immediately following the terminal date. Here the statement in opposition was being tendered to the Board for the first time at the hearing, some eight days after the terminal date.

9. In view of the above ruling, there was, of course, no purpose to be served by enquiring further as to the circumstances under which the statement in opposition came into the possession of the employer.

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12. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on January 28, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Notwithstanding this, the respondent asks the Board to direct that a representation vote be held in this case on the grounds, firstly, of the alleged opposition by employees to the applicant, and secondly, of the large number of employees who have, since the filing of the application, been laid off or otherwise left the bargaining unit.

13. For the reasons stated earlier, however, the Board was not in a position to receive any evidence of alleged opposition by employees to the applicant, and has none before it now. On the second ground, the diminution of the bargaining unit following the filing of the application such as occurred here has never caused the Board to withhold certification from an applicant trade union.

14. Accordingly, a certificate will issue to the applicant.

2164-78-R Canadian Union of Industrial Employees, Applicant, v. Bermay Corporation Limited, Respondent, v. Goldcrest Furniture Ltd., Intervener.

Representation Vote – Sale of a business – Employer alleging purpose of vote misrepresented – Whether causing Board to set aside vote – Employer objecting to union scutineer – Consent and Waiver executed after vote and ballots counted – Board not permitting employer to pursue objection – Whether collective agreement or bargaining rights only continued after intermingling – Scope of bargaining unit determined

BEFORE: M. G. Picher, Vice-Chairman and Board Members J. D. Bell and D. B. Archer.

APPEARANCES: *Judith McCormack and Peter Dorfman for the applicant; Philip J. Wolfenden and Bill Nathanson for the respondent; Ian C. Welsh for the intervener.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER D. B. ARCHER; February 8, 1980

1. This application raises a number of fundamental issues respecting the operation of section 55 of *The Labour Relations Act*. Before dealing with them, however, the Board must address a number of objections raised by the employer relating to a representation vote ordered by the Board under section 55(8) of the Act.

2. By its majority decision dated July 12, 1979, [1979] OLRB Rep. July 608 the Board found that there had been the sale of a business from Goldcrest Furniture Ltd. (hereinafter referred to as "Goldcrest") to the respondent (hereinafter referred to as "Bermay") and an intermingling of employees within the meaning of section 55 of the Act. The Board ordered the taking of a representation vote among the employees of the respondent in a bargaining unit determined by the Board. The purpose of the vote was to determine whether the Board should declare that the collective agreement is no longer binding upon the employer and that the union is no longer the bargaining agent of the employees in the bargaining unit. The vote was held on September 17, 1979. Of the 67 ballots cast, 34 were marked in favour of the applicant union and 33 were marked against it.

3. After the counting of the ballots, the respondent requested a hearing, alleging in a letter of its counsel, dated September 25, 1979, that the employees had been misled by statements of representatives of the union. The statements were to the effect that if the union won the vote, the employees would come under the contract between the union and the predecessor employer, Goldcrest. The respondent submits that the issue in the vote was whether the applicant should represent the employees and nothing more. According to the respondent, a successful vote would only entitle the applicant to serve notice to bargain and to commence negotiating a new collective agreement on behalf of the employees as though the union was newly certified.

4. The respondent further submits that a change which occurred in the Board's notice to employees prior to the taking of the vote would have caused confusion in the minds of the employees. It submits that on that basis the vote should be set aside. The "Notice of Taking of Vote" (Form 42) first issued by the Registrar of the Board and dated August 28, 1979 contained the preamble:

"Whereas Canadian Union of Industrial Employees has applied to the Board for a Declaration under Section 55 of The Labour Relations Act that Bermay Corporation Limited is bound by the collective agreement between the Canadian Union of Industrial Employees and Goldcrest Furniture ..."

By letter dated September 10, 1979 counsel for the respondent returned the notices to the Registrar submitting:

"The manner in which the Notice has been drawn is such as to create the impression that the employees will be voting on the question of whether Bermay Corporation Limited is bound by the collective agreement between the Union and Goldcrest Furniture Ltd."

5. The Registrar exercised his administrative discretion to re-issue the notices with the following amended preamble on September 10, 1979:

"Whereas Canadian Union of Industrial Employees has applied to the Board for a Declaration under section 55 of The Labour Relations Act, the Board has directed a representation vote be taken among certain employees of Bermay Corporation Limited as to whether or not they wish to be represented by the Canadian Union of Industrial Employees in their employment relations with Bermay Corporation Limited."

6. We deal firstly with the impugned propaganda statements of the union and the somewhat related issue of the notices. The vote was, as the respondent submits, a vote strictly on whether the employees wish to be represented by the union. But, as the Board will elaborate later, it cannot be said that the outcome of the vote would have no bearing on the status of the collective agreement. In the normal course, having found a single bargaining unit to be appropriate, if the vote had gone against the union the Board would inevitably have declared the collective agreement at an end.

7. It is the essence of a representation vote that union and employer will make contradictory statements and promises to the employees. Their statements tend naturally to favour their own objective and must be viewed in that light by any reasonable employee. To expect the parties to adhere to a standard of absolute accuracy in their every campaign utterance would reduce the traditional right of free speech to something close to the vanishing point. Apart, therefore, from redressing the effect of statements which are coercive and are of themselves breaches of the Act, the Board does not referee the accuracy of the propaganda statements of the parties to a representation vote. It is entirely within the ability of the parties, by means of their own propaganda, to correct or counter what they view as misleading or inaccurate statements made by their adversary. And in the end it is for the employees to decide what weight they will give to the statements of either side. In this case the challenged statements of the union were not coercive, they were open to reply by the employer and ultimately they could be evaluated by the employees. Indeed, for the reasons following in this decision, the challenged statements were arguably correct at the time they were made, and certainly no less accurate than the opposing position taken by the employer.

8. For the foregoing reasons the Board does not view the statements of the union as a reason to interfere with the result of the vote. We are likewise satisfied that the Registrar's technical refinement of the notice to the employees – a change made after the respondent's request – would not have caused any substantial confusion in the minds of the employees.

9. At the hearing counsel for the respondent raised a further objection to the regularity of the representation vote. He submitted that the vote was prejudiced by the participation of the union's president, Mr. P. Dorfman, as its scrutineer at the balloting. He also asked for an adjournment because the owner of the company, Mr. William Nathanson, was out of the country and unavailable for the hearing. Counsel for the respondent indicated that the sole purpose for adjourning would be to allow Mr. Nathanson to testify to the union propaganda prior to the vote and to the participation of Mr. Dorfman as scrutineer. The union's counsel then admitted all of the facts about the union's propaganda statements and Mr. Dorfman's role as scrutineer as they were alleged by the respondent. The need for Mr. Nathanson's testimony was removed and the adjournment was therefore denied.

10. The Board was previously aware of the respondent's objection to the participation of the union's president as scrutineer. Mr. Dorfman's nomination as scrutineer was the subject of an earlier decision of the Board, *Bermay Corporation Limited*, [1979] OLRB Rep. Sept. 848. That decision arose out of the objection of the employer to the participation of Mr. Dorfman as the union's representative at the vote. The employer intended to bar Mr. Dorfman from its premises on the day of the vote to prevent him from acting as scrutineer. Pursuant to its authority under section 92(2)(j) of *The Labour Relations Act*, the Board ordered the employer to allow any scrutineer designated by the union to enter its premises for the purposes of the representation vote. In so doing, the Board noted that it was not neces-

sarily endorsing the union's choice of scrutineer, thereby leaving the matter open for an objection in the appropriate form after the balloting.

11. Normally when all of the ballots are in the box following a representation vote the parties are given the opportunity of having the ballots counted immediately by the Board's Returning Officer. That way parties can learn right away what their collective bargaining situation will be as a result of the vote. A further advantage to an immediate count is that the result may render academic outstanding issues attaching to the application and eliminate the need for further litigation. The Board will not, however, count the ballots immediately after the vote unless it is clear that both parties are prepared to be bound by the result of the count. The Board therefore requires the parties to sign a "Consent and Waiver" form prior to counting the ballots. In this case the Consent and Waiver form presented to the parties states:

"We the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on the 17th day of September, 1979.

And we hereby waive any objections as to the regularity and sufficiency of the balloting." "

Prior to the counting of the ballots the above form was signed by Mr. Dorfman for the union and by Mr. Brisbin, the employer's counsel, for the company.

12. The employer, by objecting now to the union's scrutineer, is attempting to go back on that understanding. Having first waived any objection to the conduct of the vote it is not open to the employer to complain about the regularity of the balloting now having learned that the result of the vote was favourable to the union. That is precisely what the Consent and Waiver form is designed to prevent. If the Company had wished to pursue its objection it should have requested that the ballot box be sealed and the ballots not be counted pending a ruling on the merits of its complaint. Having failed to do so it may not now deny its counsel's undertaking.

13. The principal issue before the Board is whether a successful representation vote under section 55(8) of the Act results only in the preservation of a union's rights of representation in the workplace or whether the outcome of the vote can also go to the continuation of the collective agreement that was the product of those representation rights.

14. The employer submits that both the effect of section 55 and the intention of the Board's order is that the vote should determine only whether the union should be entitled to bargain on behalf of the employees. The respondent's position in this regard proceeds from a view of the operation of section 55 which is difficult to reconcile with the history of the Act.

15. There was a time when section 55 used to operate in the way the respondent says it should in this case. The first legislation imposing a duty on a successor employer when he purchased a business where a collective agreement was in effect was *The Labour Relations Amendment Act, 1962-63*, S.O. 1962-63, c. 70, s. 1, which introduced what was then section 47a(2) into the Act:

“Where an employer who is bound by or is a party to a collective agreement with a trade union or on behalf of whose employees a trade union has been certified as bargaining agent or has given or is entitled to give notice under section 11 or 40 [now 13 or 45] sells his business, the trade union continues, until the Board otherwise directs, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement, and such notice has the same effect as a notice under section 11.”

16. That legislation kept the collective agreement and a union's bargaining rights distinct. What survived the sale of a business was the union's right to bargain on behalf of the employees in a bargaining unit like the unit described in the prior collective agreement or in an outstanding certificate. In other words, the union found itself in the same position as a newly certified union. The result was that the employees were then subject to having their terms and conditions of employment negotiated anew. The employees were not protected by the operation of what was then section 59 (now section 70), from changes in their terms and conditions of employment until the union gave the new employer notice of its desire to bargain. The collective agreement ended and the continued entitlement of the employees to have their contracts of employment unchanged depended on how quickly their union gave its notice to bargain. In the result, there was considerable insecurity surrounding the rights of employees as to their terms and conditions of employment if the business was sold to a new employer. And most importantly, the sale of the business effectively terminated the collective agreement.

17. That was radically changed by an amendment of the section seven years later. *The Labour Relations Amendment Act, 1970* (No. 2), S.O. 1970, c. 85, s. 22 replaced the above section with what is now section 55(2):

“Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.”

18. The section as it now stands stabilizes the *status quo* from the moment of the sale and gives more security to employees and their union. Under the present provisions of section 55, the first question is whether the sale of business has occurred. A determination by the Board that a sale or transfer has occurred within the meaning of section 55 of the Act means that the collective agreement continues in force without interruption, binding the new employer just as it did his predecessor. There is no hiatus in the operation of the collective agreement and no room for the unilateral imposition of changes. The successor employer is obliged to observe the terms of the agreement in relation to all of the employees who come under it until the Board otherwise declares.

19. A necessary adjunct to the preservation of collective agreements or bargaining rights, as the case may be, after the sale of a business is the ability to sort out competing interests where two or more collective agreements or two or more sets of bargaining rights appear to conflict. No less important is the ability to make adjustments when, as in this case, “non-union” employees of a successor employer are intermingled with employees whose terms and conditions of employment have been regulated under a collective agreement handed down from a predecessor employer. To deal with that problem section 55(6) of the Act provides:

“Notwithstanding subsections 2 and 3, where a business was sold to a person who carries on one or more other businesses and a trade union or council of trade unions is the bargaining agent of the employees in any of the business and such person intermingles the employees of one of the businesses with those of another of the businesses, the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (a) declare that the person to whom the business was sold is no longer bound by the collective agreement referred to in subsection 2;
- (b) determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) declare which trade union, trade unions or council of trade unions, if any, shall be the bargaining agent or agents for the employees in such unit or units; and
- (d) amend, to such extent as the Board considers necessary, any certificate issued to any trade union or council of trade unions or any bargaining unit defined in any collective agreement.”

Section 55(6)(a) of the Act was enacted at the same time as section 55(2). It gives the Board a discretion to deal with the realities of each particular situation where intermingling occurs. It clearly does not provide that the Board *shall* terminate the collective agreement any time there is intermingling of employees after the sale of a business.

20. Where the intermingled employees are drawn entirely from two bargaining units represented by two different unions the Board presumes that the majority of them have chosen collective bargaining as the mode of relationship with their employer. The issue then is not whether the employees should be represented by a union but rather which of the two unions should be their bargaining agent. If an overwhelming majority of the employees are members of one union the Board may, without more, declare that union to be exclusive bargaining agent for all of them (see, e.g. *Alliance Dairy Ltd.* [1966] OLRB Rep. Aug. 337). If, on the other hand, both unions represent a substantial number of employees the Board may, pursuant to section 55(8), order a representation vote by which the employees choose which of the two unions will be their bargaining agent. (e.g. *The Borden Company Limited* [1970] OLRB Rep. Jan. 1244). The result of the vote will inevitably extinguish one trade union’s bargaining rights and collective agreement.

21. When, as in this case, the employees are drawn from two sources, one of which has not had collective bargaining, the Board may consider whether it is appropriate to exercise its discretion under section 55(6) to terminate a union's bargaining rights and, with them, its collective agreement. It may do so directly, without a vote, when a union represents only a small percentage of the employees. (e.g. *The Corporation of the City of Mississauga* [1974] OLRB Rep. Mar. 184). Where, however, a substantial number of the employees have been represented by a union, the Board may take a representation vote among the employees to assist it in that determination. That is what was done in this case.

22. But whether the Board is dealing with the admixture of entirely unionized employees or of union and non-union employees, in the face of favourable evidence the Board's presumptive approach, based on the purpose of section 55 of the Act, is not to interfere with established bargaining rights. If the employees indicate in a vote that they wish to be represented by a union and the union's bargaining rights have matured into a collective agreement, the Board will declare that the collective agreement is no longer binding on the employer only where there are extraordinary and compelling industrial relations reason for doing so.

23. In this case the employer argued that for a number of reasons, notwithstanding the results of the vote the Board should terminate the collective agreement and instead make a declaration that the union is the bargaining agent of the employees. First, it submits that the vote should be given less weight because it was won by a one vote margin. Secondly it argues that the content of the collective agreement should be viewed as a reason for declaring that it is no longer binding on the employer. Counsel maintains that because 24 of the employees are former Goldcrest employees who had input into the negotiation of the agreement and the other 45 employees had no such input, the agreement should be ended and the union required to bargain anew especially since the agreement contains a mandatory union membership provision for all employees. It submits, on all of these grounds, that it would be unfair to the employees to allow the collective agreement to continue.

24. The union strenuously resists any suggestion that the Board should look behind the result of the vote. It argues that a vote must be premised on the notion that if you win you win, and if you lose, you lose. Certainly, if the vote had gone against the union by a one vote margin the Board could not, by any accepted majoritarian principle, have done anything but terminate the union's bargaining rights and its collective agreement forthwith. It is in that sense, and only in that sense, that the vote becomes evidence to assist the Board in exercising its discretion under section 55(6)(a). The Board cannot make any inferences whatever from the result of the vote as to which employees do or do not support the collective agreement in whole or in part. All that the Board can infer, as it does, from the vote is that a majority of the employees wish to be represented by this union. Whether the union's collective agreement should in all of the circumstances of the case be continued or terminated is a separate question. Given the overriding purpose of section 55 to preserve collective agreements, undue weight should not be given to the fact that the transferred employees had no input into the negotiation of the collective agreement. In that regard they are no different than employees who are all newly hired after the transfer of a business with a collective agreement situation in which the Board has no discretion to terminate the union's contract.

25. Counsel for the respondent advanced a number of arguments as to why the Board should view the collective agreement which was negotiated with Goldcrest as so unsuitable

to Bermay that it should be declared no longer binding. Firstly, he raises the fact that the agreement was meant to apply to both the woodworking plant and the upholstering plant of Goldcrest, while Bermay has no woodworking plant. Secondly, he submits that the seniority clause, based upon the length of service from the time an employee entered the company's employment, will cause irreconcilable conflicts. Thirdly, he argues that the agreement's provision for twelve union stewards based on two plants, and its reference to the "industrial relations manager", the "manufacturing manager" and the "general manager" in the grievance procedure, titles not found in Bermay's management ranks, are further grounds to find the agreement unsuitable. Fourthly, he maintains that the difference between the incentive work system in the collective agreement and the incentive work system which Bermay has used is reason to conclude that it should not be bound by the agreement. Lastly, he submits that only about one-third of the job classifications in the collective agreement apply to Bermay's operation. The respondent maintains that for all of the foregoing reasons the collective agreement is unworkable and should be declared at an end.

26. The jurisdiction to terminate a collective agreement is an extraordinary power, and the Board's discretion under section 55(6)(a) of the Act must therefore be exercised thoughtfully and with restraint. Other sections in the Act which give that power to the Board do so in specific language (see e.g. ss. 48(1), 49(6), 50 and 52(4) of the Act). The only part of section 55 which specifically empowers the Board to declare that a collective agreement is no longer binding on a successor employer is subsection 6(a). That is to say that the discretion only comes into play when there has been an intermingling of employees. When a unionized business is transferred to an employer who does not introduce employees from another business into the bargaining unit of predecessor employees, the Board does not have a discretion to declare that a collective agreement no longer binds the successor employer. Nor does the Board have that discretion when the sale of a business has occurred and all of the employees are either newly hired by the successor employer or entirely transferred from another of its businesses. The discretion arises only when there has been a mixing of employees from another business with the employees of the transferred business. In that circumstance the ability to declare a collective agreement no longer binding is a necessary part of the Board's jurisdiction to resolve conflicts in bargaining rights. The intermingling of employees is the linchpin of the Board's jurisdiction to declare a collective agreement no longer binding. The Board's discretion must therefore be applied and interpreted in that light.

27. Many of the points that the employer has raised to support its request to have the Board terminate the agreement will obtain in situations where a successor employer does not intermingle employees after the sale of a business and could not, therefore, ask for a declaration terminating the collective agreement. It is not uncommon, where there has been a sale of a business or part of a business, for a successor employer to inherit a collective agreement which includes articles relating to some aspect of the predecessor's business which the new employer does not wish to continue to operate. Furthermore, it is not unusual for an inherited collective agreement to include managerial titles that don't strictly coincide with the titles used by a successor employer. Nor is it uncommon for a successor employer to use only some of the employee classification found in a collective agreement or to encounter in an inherited collective agreement wage rates and remuneration schemes that are different from those which apply in its other plants. These are not insurmountable problems. It is always within the power of two parties to a collective agreement to modify the agreement as needs dictate. To the extent, therefore, that items such as those listed above appear incongruous, it is not unreasonable to expect the parties to make the necessary adjustments in the language of the agreement.

28. This is not to say that when there is an intermingling of employees following the sale of a business, there will never be good industrial relations reasons to relieve an employer from the continued operation of a collective agreement. Through subsection 6(a) of section 55 the Board has the authority to assess the merits of industrial relations problems that arise and, where appropriate, make a remedial order tailored to the facts. The Board can amend the bargaining unit, end the agreement, or it can end the union's bargaining rights. But vested contractual rights are not lightly to be interfered with, and any employer seeking such relief has a heavy onus to discharge. It must first establish that there has been meaningful degree of intermingling. For example, where two or three employees from another business of an employer are intermingled into a bargaining unit of a hundred, normally neither common sense nor the balance of convenience will favour the termination of the entire collective agreement. Secondly, the employer must satisfy the Board that because of the intermingling a continuation of the collective agreement will work immediate and substantial prejudice to the operation of its business. This, then, brings us to the employer's concern with respect to the incentive and seniority provisions of the collective agreement, the two issues raised by the respondent which arguably raise practical problems caused by the intermingling of the two groups of employees.

29. Bermay addressed no substantial representations as to how the work incentive system in the collective agreement would prejudice its operations. The Board cannot, therefore, conclude that the difference in its work incentive system will cause Bermay an industrial relations problem that justifies terminating the collective agreement. Nor can we conclude that the application of the seniority clause will create an unworkable problem. It provides, in part:

“Article 6 – Seniority

6.01 – It is understood that all employees are hired on a probationary basis and the probationary period shall continue for the first seven weeks. *Upon completion of the probationary period, an employee shall be entitled to seniority rights dating from the day on which he entered the Company's employment.* [emphasis added]

6.02 – Seniority shall be on plant-wide basis and there shall be a separate seniority list for the upholstery plant and a separate seniority list for the woodworking plant. The Company agrees to maintain seniority lists for each plant and these shall be posted in the plant within thirty days after the signing of this Agreement. Any objection to these seniority lists shall be submitted to the Company by the Union within fifteen days after the lists have been posted. After these fifteen days have expired the Company shall furnish the Union with copies of each seniority list every six months and the Company acknowledges the right of the Union to question the accuracy of a list in the event of error.

6.03(a) – In the event of layoff or recall of the workforce governed by this Agreement, the following factors will be considered:

- (a) length of continuous plant service:
- (b) skill and ability.

Where the factors in factor (b) above are relatively equal, then factor (a) shall govern.”

30. Generally the seniority provision in any collective agreement becomes important in the event of the transfer, demotion, layoff and recall of employees, in the computation of an employee's sick leave credits and vacation entitlement or when a dispute materializes over a competition among employees for a job posting. Seniority can be departmental, plant-wide or company-wide, and the arbitral jurisprudence is replete with awards arising out of the disagreement of parties as to the application of the seniority provisions of their collective agreement. The arbitral authorities establish that there can, in a merger situation, be a dovetailing of seniority lists by the operation of law. The outcome in any particular case will depend on the wording of the collective agreement. (see *Re Federal Wire and Cable* (1960), 3 U.M.A.C. 276 (Laskin); *Toronto Electric Commissions*, (1967) 19 L.A.C. (Arthurs) and, generally, Palmer, *Collective Agreement Arbitration in Canada*, (Toronto), 1978) at pp. 388-94). The Board does not view the present form of the seniority clause as creating a potential for disruption that would justify terminating the collective agreement in its entirety. Given the wording of the clause, the employer will never be without the requisite number of qualified employees no matter how the clause is applied to the employees.

31. Both the incentive work scheme and the seniority clause are the kind of matters which parties to a collective agreement can, after the sale of a business, adjust themselves to make sense of their contractual relationship. Alternatively, as the Board has noted, any unsettled difference can be adjudicated when an appropriate grievance finds its way to arbitration. In this case, for the reasons given, the Board does not consider either the incentive work system or the seniority provision grounds to vitiate the entire collective agreement.

32. The final issue is the question of which employees are covered by the collective agreement that has survived the sale. The company submits that from the time of the sale it is required to apply the collective agreement only to the employees who were previously employed by Goldcrest. It takes the position that employees transferred into the newly purchased plant from Bermay's business previously located at Chesswood Drive have no rights under the collective agreement at least until a finding of a sale has been made by the Board or, alternatively, until the time when the Board declares that the agreement should continue. The union submits that all employees in the plant purchased by Bermay, including newly hired and transferred employees, fall into the bargaining unit as of the time of their transfer or hire and must be paid and otherwise dealt with according to the terms of the collective agreement, at least until the collective agreement is terminated under section 55(6)(a).

33. The respondent's argument raised the suggestion that an order under Section 55(6)(a) of the Act terminating the collective agreement would relieve the employer of both past and present obligations under the contract. While counsel's argument was not absolutely clear on this point, it seemed to anticipate that a declaration at the present time terminating the collective agreement would retroactively void the agreement from the time of the sale. He also seemed to hold the alternative view that a declaration at this time favourable to the continuation of the collective agreement would mean that it would apply to the transferred employee only from this time forward. It is clear to us, given the very words of the section, that any declaration by the Board under section 55(6)(a) that an employer “is *no longer* bound by the collective agreement” can only be prospective in effect. Many rights under the Act, including access to arbitration, conciliation and the bar against strike and lock-

out depend on the existence of a collective agreement. Given the scheme of the Act there are obvious policy reasons to limit the scope to be given to the Board's order in this circumstance. In this regard it is instructive to compare the wording of section 50, by which the Act renders "void" a collective agreement made following a certification obtained by fraud. While, given the outcome of this application, it need not be conclusively determined by this case, it would appear that under section 55(6)(a) the Board cannot rescind the operation of the collective agreement for any period of time prior to the date that an application is filed under the section. (*The Bryant Press Limited*, [1972] OLRB Rep. Mar. 186.)

34. The rights of employees under the collective agreement after a sale are clearly not, therefore, dependent on and effective only from the date on which the Board finds, in a contested case, that a sale has occurred or, alternatively, the date on which it determines that the collective agreement should not be terminated. The thrust of section 55 is that the rights of all employees under the umbrella of the agreement are preserved effective from the date on which the sale of the business takes place. That raises the issue of which employees come under the umbrella of the agreement.

35. Section 55 of the Act cannot be applied or interpreted without regard to the first principles of bargaining under the Act. Bargaining rights under *The Labour Relations Act* have two incontrovertible attributes. Firstly, they apply to a bargaining unit rather than to individuals, and, secondly, they are exclusive. *The Labour Relations Act* contemplates that employees will be grouped, accordingly to their jobs, into an aggregation of job classifications – the bargaining unit – that, once established, is indivisible for purposes of collective bargaining. An employee may be a member of more than one union, but when he works for a given employer he is exclusively represented by the union that holds the bargaining rights for the job classification in which he is employed. The employees within the unit bargain with one voice through one union toward one collective agreement by which they and their employer will be bound.

36. That is not to say that the bargaining unit is immutable. By an order of the Board or by the agreement of the parties a bargaining unit may be altered in its job composition. It may also increase or decrease in size. For example, when an employer with a unionized plant within a given municipality opens a second plant in the same municipality and a union holds the bargaining rights for all employees of that employer within the municipality, there is a resulting accretion to the bargaining unit. The recognition clause in the collective agreement governs and the second plant falls within the bargaining unit by the operation of the private law of the parties. The same would be true if municipality-wide bargaining rights are held under a Board certificate, prior to the making of a collective agreement. There the accretion to the bargaining unit occurs by the operation of the Act. Always the critical starting point for collective bargaining is the bargaining unit – a collectivity which may increase or decrease in size, but all of whose members occupy job classifications that give them a common industrial relations interest in consequence of which they are exclusively represented by a single trade union under the Act. Together they choose their bargaining agent and through it they bargain with their employer, strike or are locked out, and finally make and live by a collective agreement.

37. Bermay's assertion that the transferred employees are outside the agreement and governed by individual contracts of employment flies in the face of the fundamental proposition that when a collective agreement operates, it operates comprehensively. Perhaps the

most definite statement of the sovereignty of the collective agreement was made by the Supreme Court of Canada in *Syndicat Catholique des Employés de Magasins de Québec, Inc. v. Compagnie Paquet Ltée* [1959] S.C.R. 205 at 212; 18 D.L.R. (2d) 346 at 353-4 where Judson, J. for the majority of the Court said of employment relations in a workplace with a collective agreement:

“There is no room left for private negotiation between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in the future conduct his master and servant relations ...”

38. Central to the concept of the collective agreement is the right which the union has to see the agreement observed, a right separate and distinct from the rights of individual employees who may come and go. In *McGavin Toastmaster Ltd. v. Ainscough* (1975), 54 D.L.R. (3d) 1 (S.C.C.) at 6 Laskin, C.J.C., for the majority, emphasized that employees who came into a business do so on the terms of the collective agreement. In this regard he quoted with approval the following words of Judson J. in the *Paquet* case found at 355 D.L.R.; 214 S.C.R.:

“If the relation between employee and union were that of mandator and mandatory, the result would be that a collective agreement would be the equivalent of a bundle of individual contracts between employer and employee negotiated by the union as agent for the employees. This seems to me to be a complete misapprehension of the nature of the juridical relation involved in the collective agreement. The union contracts not as agent or mandatory but as an independent contracting party and the contract it makes with the employer binds the employer to regulate his master and servant relations according to the agreed terms.”

39. It is against this background that the operation of section 55 of the Act must be construed. Upon the sale of a business section 55(2) dictates that the collective agreement be given full force and effect. In an agreement continued under section 55(2), as in any collective agreement, it is the scope clause that determines which employees come under it, at least until some contrary order is made by the Board under section 55(6). As the agreement continues to operate, so does its scope clause. Since the scope clause applies to job classifications, and not to individuals, employees newly hired or transferred into those job classifications must fall under the agreement. That is the result most true of the language of section 55 and to the first principles of unit bargaining under the Act.

40. The contrary interpretation of section 55 put forth by the employer, separating as it does former Goldcrest employees from former Bermay employees, would work a dramatic departure from the established concept of unit bargaining. If the employer's argument is correct a number of strange things would happen in the industrial relations of its newly acquired workplace. Two separate groups of employees would work side by side in the same job classifications. One group of employees would have collective bargaining through a union and the other would not. The terms and conditions of employment for one group

would flow from the collective agreement while the other group would be governed by individual contracts of employment. One group would have the right, through their union, to bargain with the employer and engage in a lawful strike. The other group would not. Furthermore, the non-union employees could at any time organize and get certified by another union. Or they might obtain representation by the same union and bargain on a different timetable from their fellow employees. And where would newly hired employees fit within this division? Would they fall into the bargaining unit as they inevitably would in a successorship that does not involve the intermingling of employees, or would they join the transferees with individual contracts of employment?

41. Tracing the ramifications of the employer's position makes it clear that it is inconsistent with the scheme of *The Labour Relations Act*. By the passage of section 55 of the Act the Legislature did not intend to construct a mechanism that could create such confusion and do such violence to the concept of unit bargaining. There is nothing on the face of section 55 to suggest that after the sale of a business a union's collective agreement should be other than fully alive or that its scope clause should be other than vital and binding, extending to all employees in the workplace who fall within it. In our view, the words of section 55 of the effect that the agreement is binding upon the successor employer *until* the Board otherwise declares, mean just what they say. The language of the section makes it patently clear that the legislature intended the agreement to apply to all the employees who would by virtue of their job classifications fall within the scope of the bargaining unit.

42. In this case the controlling fact is that the employees of Bermay were poured into the Goldcrest location. As employees entering the acquired business, they became part of a living bargaining unit, and not a dormant unit comprised only of former Goldcrest employees. To conclude otherwise is to amend section 55(2) to say that upon the sale of a business a successor employer is bound by all terms of the collective agreement except the scope clause. That is not what the section says.

43. Sometimes the policy of the Act to preserve collective bargaining rights will result in two collective agreements existing side by side. That would have happened in this case if the transferred employees had come from another plant of the employer with its own collective agreement negotiated with another union containing a scope clause overlapping the scope clause in the collective agreement in force in the newly purchased plant. In that situation the policy of the Act to preserve established bargaining rights would require the employer to respect both collective agreements until a Board order could be made determining which union and which collective agreement should have precedence. The wording of section 55(6) anticipates that situation and provides the mechanism to resolve it.

44. Where, however, there is only one collective agreement involved, any transferred or intermingled employees from another business must, like newly hired employees, clearly fall within the bargaining unit as of the time of their transfer. We realize that our conclusion in this regard is different from the conclusion of the Board in *Bryant Press Limited* [1972] OLRB Rep. Apr. 301. That decision, made shortly after the amendment of section 55 of the Act and prior to much of the jurisprudence that has evolved under the section, can no longer be viewed as an authoritative statement of the rights of parties under section 55 of the Act.

45. For the foregoing reasons the Board has reached the following conclusions, which it summarizes for the purposes of clarity:

- 1) The sale of a business from Goldcrest to Bermay took place within the meaning of section 55 of the Act (see *Bermay Corporation Limited* [1979] OLRB Rep. July 608).
- 2) From the time of the sale Bermay became bound to the collective agreement previously in effect between the applicant union and Goldcrest.
- 3) An intermingling of employees took place within the meaning of section 55(6) of the Act. Employees transferred to the former Goldcrest plant came under the collective agreement from the time of their transfer.
- 4) Pursuant to its authority under section 55(6) the Board amended the wording of the bargaining unit description to suit the respondent's situation. The Board then ordered the taking of a representation vote pursuant to section 55(8) to determine whether it should exercise its discretion to declare the collective agreement no longer binding, and terminate the bargaining rights of the applicant union.
- 5) There was no material misrepresentation made by the union to the employees as to the consequences of a vote in favour of the union, nor was there, as a result of the change in the wording of the Board's notice to the employees any reasonable likelihood of confusion among the employees sufficient to cause the Board to disregard the result of the vote.
- 6) The union having won the representation vote and there being nothing in the collective agreement which sufficiently prejudices the respondent so as to cause the Board to end the collective agreement, the Board does not declare that the collective agreement is no longer binding upon the employer.

DECISION OF BOARD MEMBER J. D. BELL:

1. On July 12, 1979 the Board issued a decision in which the majority found that the transactions discussed in that decision constituted the transfer of part of Goldcrest's business to Bermay within the meaning of section 55 of *The Labour Relations Act*. I dissented from this finding, my dissent being recorded in that decision.

2. Having made that decision, the majority went on to state in paragraph 17:

"That finding, however, does not dispose of the matter. In this case the respondent has some 70 production employees, 24 of whom were represented for collective bargaining purposes by the applicant under the predecessor employer. While section 55 of the Act operates to protect the *bargaining rights* of those employees and their union it also provides a mechanism to balance their interest with the interest of the respon-

dent's former employees and new employees who work side by side with them." [emphasis added]

3. The majority continues in paragraph 18, which states:

"An obvious concern in the resolution of the conflict that arises upon the intermingling of employees who have previously been organized with employees who were previously not organized is the interest of the employer to have its industrial relations conducted within the framework of a rational bargaining structure. In this case, the Board is satisfied that it would be contrary to the interests of the employer and of the employees as a group to segregate the former employees of Goldcrest into a vestigial bargaining unit that would exclude all other production employees. It would, in our view, be equally inappropriate to effectively grant the bargaining rights for the two thirds of the production employees who have not previously been organized to the applicant without any indication of the wishes of that majority group. The Board is therefore satisfied that it should in these circumstances describe the appropriate bargaining unit and exercise its discretion under section 55(8) of The Labour Relations Act to conduct a *representation vote* among all the employees in the bargaining unit." [emphasis added]

4. The majority then described the bargaining unit and who shall vote in paragraphs 19 and 20. Paragraph 21 stated:

"Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent."

5. The decision having been made that a sale within the meaning of section 55 had occurred I agree with the above reasoning and the direction to conduct a representation vote.

6. The purpose of the vote was clear and not ambiguous, i.e., *do the employees wish to be represented by the applicant in their employment relations*. There was no mention or even an inference in the July 12, 1979 decision that the purpose was to determine whether the Goldcrest agreement should apply to the Bermay operations. The first reference about Bermay being possibly bound by the Goldcrest collective agreement was when the first Form 42 was issued on August 28, 1979. This was objected to and was withdrawn by the Registrar. A new Form 42, which properly reflected the Board's direction, was issued on September 10, 1979. Once again this direction was specific and clear.

"Whereas the Canadian Union of Industrial Employees have applied to the Board for a declaration under section 55 of The Labour Relations Act, the Board had directed a representation vote be taken among certain employees of Bermay Corporation Limited to *whether or not they wish to be represented by the Canadian Union of Industrial Employees in their employment relations with Bermay Corporation Limited*." [emphasis added]

This theme was continued on the ballot which the Board presented to the employees to indicate their wishes.

7. The Board's decision of July 12, 1979 was clear and the direction for conducting the vote was specific as well as the wording on the ballot used by the Board at the polling place. None of these made any reference to the interpretation now cited as the purpose of the vote in the majority decision in section 4 of paragraph 45:

“... to determine whether it should exercise its discretion to declare the collective agreement no longer binding, and terminate their bargaining rights of the applicant union.”

This interpretation has risen out of the hearing held subsequent to the vote and the counting of the ballots. This hearing was held October 22, 1979 and concerned certain allegations of impropriety which have been dealt with on the majority report. I have no disagreement with the majority findings in those matters.

8. The majority decision goes to great lengths to interpret section 55 very narrowly and infer that the Board's discretion is limited; particularly as it refers to section 55(2). However, in my opinion, section 55(6) gives the Board power and the discretion to sort out the problems that are created by a declaration that this transaction is a sale for purposes of the Act. Further, section 55(8) permits the Board to hold a representation vote to help determine what it should do in any specific case.

9. In the instant case the Board noted that only 24 of the 67 employees involved were former employees of Goldcrest and ordered a vote to be held to decide if the majority wished to be represented by the union. It is interesting to note that if this was an application for certification 24 out of 67 would not be sufficient for even a pre-hearing vote. However, the vote was held and the employees indicated by a one vote majority that they wished to be represented by the union in their employment relations with Bermay.

10. The next step the Board should take is to declare that the applicant union represents the employees in their employment relations with Bermay Corporation Limited. If the Board is concerned that the Goldcrest agreement may interfere with such declaration then that agreement should be declared null and void as it pertains to the Bermay bargaining unit.

11. When the Board goes beyond the above and declares that as a result of the vote the Goldcrest agreement is binding of Bermay and its employees, the purpose of the vote had been misrepresented to those who cast their ballots. The only way which this misrepresentation, though it may have been inadvertent, can be corrected at this stage, is to conduct a new vote and ensure that the Board's direction clearly indicate that the matter to be decided by the vote is the question of the Goldcrest agreement.

12. The next point in the summary of the majority is item 6 i.e., “there is nothing in the collective agreement which sufficiently prejudices the respondent”. This causes me concern because the majority have simply brushed aside the various differences which were identified at the hearing by saying the parties can renegotiate these areas and if they cannot reach an agreement, they can resort to arbitration, under the terms of the collective agree-

ment. In my opinion this is a naive suggestion because Article 9.10 of the agreement limits the power of the Board of Arbitration in that it shall not have any authority to make any decision which is inconsistent with the terms of the agreement. Therefore, the only solution to the problem of agreement language is to bargain in good faith for a complete agreement as contemplated by section 14 of the Act.

13. I would therefore direct that:

- 1) The Goldcrest agreement does not apply to the Bermay Corporation from the date of sale except, as it may apply to those Goldcrest employees in accordance with the *Bryant Press Limited* case which was the authorizative statement in effect at the time of the sale.
- 2) The bargaining rights of the Canadian Union of Industrial Employees will flow to the Bermay Corporation in the bargaining unit described in the decision of July 12, 1979.
- 3) The parties should meet to negotiate a collective agreement as contemplated in section 14 of the Act.

1856-79-R J. Wackett and a Group of Employees, Applicant, v. Christian Labour Association of Canada, Respondent.

Bargaining Rights – Collective Agreement – Whether Union entitled to represent employees at time agreement entered into

BEFORE: E. Norris Davis, Vice-Chairman, and Board Members A. HersHKovitz and F. W. Murray.

APPEARANCES: *Jean Wackett and Edward Werner for the applicant; Fred Heerema and Hank Beckhuis for the respondent.*

DECISION OF THE BOARD; February 8, 1980

1. The name: "The Christian Labour Association of Canada" appearing in the style of cause of this application as the name of the respondent is amended to read: "Christian Labour Association of Canada".
2. This is an application made under section 52 of *The Labour Relations Act* seeking a declaration that the respondent trade union was not, at the time of entering into a voluntary recognition agreement with the Tufford Rest Home, entitled to represent the employees in the bargaining unit.
3. The respondent union raised a preliminary objection that the description of the

applicant in the style of cause as “non-union members of the Tufford Rest Home” did not indicate the application as being brought by “an employee in the bargaining unit”. The Board is satisfied, having regard to all the circumstances, that the application is brought by J. Wackett and a group of employees in the bargaining unit, and the style of cause is hereby amended by substituting the name of the applicant to read: “J. Wackett and a Group of Employees”.

4. The respondent union noted that no one appeared for the employer nor had the employer filed lists of employees for the relevant date, i.e., the date on which the voluntary recognition agreement was executed. The respondent union noted section 52(3) which reads:

“On an application under subsection 1, the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.”

and argued that the employer’s failure to file lists of employees was a breach of his obligation under the Act and made it impossible for the respondent union to discharge the onus on it as a party to the agreement. The Board is of the opinion that the onus of establishing that the trade union was entitled to represent the employees at the relevant time falls on either or both of the parties to the voluntary recognition agreement and that such evidence must be adduced at the hearing. As was said in the *National Plastering Company Limited* case, [1967] OLRB Rep. Dec. 876 at 877:

“... In order to satisfy the onus set forth in section 45a(3) [now section 52(3)], the parties to the agreement must establish that the trade union was entitled to represent a simple majority of the employees in the bargaining unit at the time the agreement was entered into.”

5. It was testified by Mr. Heerema that at the time of the signing of the collective agreement on April 26, 1979, there were twenty employees in the bargaining unit and that eleven of these employees were persons who had signed applications for membership in the union. These applications, together with countersigned receipts, were filed with the Board. It was also testified on cross-examination that five written resignations from membership were received by the union prior to the date on which the voluntary recognition agreement was executed. Additionally, Mrs. Debbie Smeets testified that she sent, by registered mail on March 14, 1979, a letter to the union (copy of which was filed with the Board) stating that she wished to resign as a member of the union. Mrs. Smeets also testified that she saw similar letters written by four other employees and that all were mailed to the union by registered mail on March 14, 1979.

6. Accepting the evidence, which was not rebutted, that on April 26, 1979, at the time of signing the voluntary recognition agreement, there were twenty employees in the bargaining unit, the evidence establishes that at that time the respondent was not entitled to represent more than six of these employees which is less than a simple majority.

7. The Board therefore declares that the respondent union was not, at the time the voluntary recognition agreement was entered into, entitled to represent the employees of

the Tufford Rest Home in the bargaining unit defined in that agreement, and accordingly, the said voluntary recognition agreement ceases to operate pursuant to the provisions of section 52(4) of the Act.

1630-79-R Canadian Union of Distillery, Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304, Applicant, v. **The Clorox Company of Canada Ltd.**, Respondent.

Certification – Practice and Procedure – National union losing representation vote – Board imposing 6 month bar – Whether local union barred – Whether employees voting on representation by national or local union

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members S. H. Lewis and J. A. Ronson.

APPEARANCES: *J. C. Nelson, A. Dunsmuir, M. McNamee and W. Rannachan for the applicant; W. S. Gardner, Andrea Davidson, M. M. Trask, Barry Bevagua and John Kingston for the respondent.*

DECISION OF VICE-CHAIRMAN PAMELA C. PICHER AND BOARD MEMBER S. H. LEWIS; February 20, 1980

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2. This is an application for certification.

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4. An issue raised in this application is whether a local union is barred from applying for certification during the period of a bar imposed against any further applications by the national union of which the local is an affiliate.

5. In June, 1979, the Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, (hereinafter referred to as “the National”) filed an application for certification. Their membership strength was well over 55 per cent; ordinarily they would have been entitled to immediate certification. Certification was not forthcoming, however, because the Board determined that the respondent company was in the process of building up its workforce. In accordance with the Board’s practice in a build-up situation, a representation vote was ordered to take place following the substantial completion of the build-up work force. This procedure would enable the new employees to participate in the decision as to whether or not they would be represented by the National. The vote was held on August 31, 1979. The National lost the vote and the Board, in further compliance with its normal practices, barred the National from making another application for six months (File No. 0567-79-R, decision dated September 19, 1979).

6. Within the period of the bar the applicant, Local 304 of the National (hereinafter referred to as "the Local"), applied for certification. The respondent company contends that in the circumstances of this case the bar against the National should apply to preclude the Local from making its application.

7. The evidence in this case clearly supports the conclusion, which is not disputed by counsel for the company, that the National and the Local are two separate entities. Each in its own right has been granted trade union status for the purposes of *The Labour Relations Act*. Each has separate officers, auditors, newsletters, strike funds, bank accounts, constitutions and by-laws. Assets of each are completely separate and distinct. No officer of the National is an officer of the Local or vice versa.

8. The Board has repeatedly recognized parent unions and their locals as separate entities and has regularly held that a bar against a repeated application for certification by one such entity is not a bar against an application for certification filed by its related union.

9. In *Pinehill Auto Ltd.*, [1968] OLRB Rep. July 375, for example, the Board entertained an application for certification by one local of the Teamsters less than two months after entertaining an application for certification for the same employees made by another local of the Teamsters. In declining to impose a bar on the second application, as requested by the company, the Board stated at p. 375,

"The Board has always treated an international or national trade union as a separate and distinct entity apart from its locals and has also treated each local of a trade union as a separate and distinct entity. Accordingly, when a local of a trade union makes an application for certification for a unit of employees that another local of the same trade union has just previously unsuccessfully sought certification, the new applicant is in no different position than if the application had been made by an entirely different trade union or one of its locals."

Similarly in *Swingline of Canada Ltd.*, [1971] OLRB Rep. Nov. 710, the Board refused to apply a six month bar imposed against one local to block an application for certification filed by a sister local. The Board recognized them as two separate entities and noted with approval that the membership cards in the second application were fresh so that the membership evidence was separate and distinct from the evidence in the first application.

10. The facts in another decision of the Board, *Elm Tree Nursing Home*, [1978] OLRB Rep. Nov. 984, are markedly similar to those in the instant case. The Board refused to apply against the International's application for certification a bar it had imposed against the local. In *Elm Tree*, the same person conducted the organizing in both campaigns. For the local's campaign the individual acted in his own right as the locals' organizing supervisor. For the subsequent campaign by the International, he acted as the International's agent. In dismissing the concern that the same person had carried out the organizing for both campaigns, the Board at page 987 said, "[o]nce we have concluded, as we have, that for the purposes of this Act Local 204 and the International are to be treated as separate entities, each with status as trade unions under the Act, the choice of the agent through which either entity acts becomes irrelevant to the entity's status".

11. Counsel for the respondent in this case acknowledged the consistency of the Board's jurisprudence recognizing and respecting the separateness of parent unions and their locals. He alleges, however, that the conduct of the campaign was such that the Board should conclude that on August 31st the employees voted against the Local rather than the National. More specifically, counsel for the employer complained that the union campaign was so imbued with Local campaigning conducted on its own behalf rather than on behalf of the National and with misrepresentations made by the Local relating to which union, the National or the Local, would be voted upon on August 31st, that the employees were confused into thinking that the August 31st representation vote was a vote relating to the Local and not the National. Counsel argues, therefore, that the Local, in essence, has already been defeated and should not now be permitted to apply within the period of the bar imposed as a result of that vote.

12. Mr. William Rannachan is the Central Regional Director of the National. Mr. John McNamee, is the National's counsel, administrative assistant and director of education and research. Rannachan, with McNamee's assistance, did virtually all of the organizing preceeding the National's filing of its application for certification in June 1979. No one from the Local participated in the campaign until just prior to the August 31st vote.

13. Rannachan testified that he held two organizing meetings in June during which he, at one meeting, and McNamee, at the other, explained to the employees in attendance the structure of the National and its relationship with its locals. He explained, for example, that the application for certification would be filed on behalf of the National but that following certification the employees would have several options open to them: they could join an existing local, set up their own local or be serviced by the National. Rannachan testified that the employees indicated that they would make their decision after certification. The evidence further establishes that two letters to the Clorox employees were sent by Rannachan, on National stationery, advising them of two meetings relating to the application for certification.

14. Mr. Cameron Nelson is a business agent employed by the applicant Local. He holds no office in the National and is paid solely by the Local. Nelson testified that he became involved in the National's campaign a week or two prior to the vote in August. McNamee took over the campaign from Rannachan when Rannachan went into the hospital in late July. In the last weeks of the campaign preceeding the vote, McNamee went on his honeymoon and asked Nelson to take over for him. Mr. Nelson's participation consisted of the following: he attended a meeting with the company and one of the Board's Labour Relations Officer to make the voting arrangements; he chaired a meeting with employees on or about August 26th; he wrote a newsletter dated August 27th for distribution to the employees; finally, he attended at the vote as a scrutineer. Nelson testified that if Rannachan and McNamee had been available to carry the campaign to its conclusion, he would not have either chaired the meeting with the employees or written a newsletter. He further stated that if it had not been for their absence, he might not have become involved in the campaign at all.

15. At the meeting of employees on August 26th Nelson was given a copy of a letter which had been sent to employees by the company. Nelson stated that because the company's letter contained numerous assertions which he viewed as significant misrepresentations, he hastily drafted a newsletter to clarify the "errors". The letter had to be distributed

to the employees prior to the imposition of the Board's 72 hour silent period which preceded the representation vote. The newsletter, upon which counsel relies heavily to support his contention that the employees were confused about which union they were voting upon was printed on Local 304 stationery and reads as follows:

"August 27, 1979.

To: All Clorox employees.

Dear Fellow Workers:

1. I am writing to you at this time in order to clear up the misleading inferences and information Mr. Kingston has written you in his last two letters.
2. In his letter of August 22, 1979, Mr. Kingston wrote that *the Union* refused to agree that the vote be held on August 31, 1979, but, that the Registrar ordered it. He knows, that that is simply untrue.
3. *The Union* did feel that you (especially those of you new to Clorox) should have more time to make up your own minds about *the Union*. This is not a decision to be rushed into. However, when the Company insisted on the 31st *the Union* agreed.
4. In his letter to you of August 23, 1979, Mr. Kingston makes several misleading statements.
5. Initiation fees, as the 23 of you have already *joined the Union* know, are \$1.00 not \$100.00.
6. Union dues, at your present rates would be \$3.00 per week. *This Union* has consistently negotiated contracts which provide its members many times the small amount of dues paid.
7. Take Diversey (Canada) Ltd.. Diversey is a Company which is about the same size in Ontario as Clorox. It manufactures chemicals and cleaning compounds as you do. Its plant is in Mississauga.
8. The major difference between you and the employee at Diversey is that last year they joined *this Union*. The Diversey general labourer will be earning \$7.12 per hour on November 1st and that does not include what he/she will be getting as Cost of Living Allowance. With an anticipated 15¢ per hour Cost of Living Allowance, the general labourer will be earning \$7.27 per hour. That is \$1.12 per hour more than you will be earning even after your recent raises.

• • •

12. The Diversey employees received improvements totalling over

27% in their two year agreement last year. There was no strike – the employees simply worked together through *the Union* to improve their working lives.

13. On Friday you too can start to have a say in your working lives and can start to win improvements by working together.
14. Mr. Kingston talks about fines and special assessments. In the six years I have been with *this Union*, *your Local* has never fined anyone for any offence – in fact no one has ever been charged for an offence. Nor have there been any special assessment [sic] which the members have had to pay. Mr. Kingston is simply trying to mislead and frighten you.

...

17. Mr. Kingston writes about strikes. He states that a strike can be called by the executive. That is completely untrue. No strike can be authorized until a majority of you vote twice to strike.

...

19. If, however, a strike were to occur, strike benefits would be \$100.00 per week (\$40.00 from *the National Union* and \$60.00 from *the Local*) and would be paid starting with the second week.
20. Just about everyone these days is in some kind of union, whether it is called an Association, Society, Brotherhood or Alliance. The difference is in name only.

...

WHY NOT YOU?

23. Unions were developed to bring people together so that their combined efforts could accomplish what is beyond the hope of an individual. One person is no match for an office manager. Remember, the manager is not alone. He has behind him employee relations experts, lawyers, economists and many others. They work as a team and the only way to balance their power is through team work by employees in a Union.

...

25. Unless there is some kind of pressure exerted through *a Union*, even sympathetic company executives cannot do all that is needed. The reason for this is simple. Company executives are required to keep costs down so that profits will be as high as possible.
26. *Our local union* has been accomplishing its goals of improving the

working and living conditions of its members and protecting them from the unfair and unjust actions of their employers since 1902 – 77 years.

27. You have already obtained a few of the advantages *the Union* can bring you. Last year, when there was no talk of Union, your raise was 5.5%. This year it is almost double that.
28. Ask yourself why the Company is so concerned about your *joining the Union*? Why are they willing to double the raise and promise you water fountains and coke machines etc?
29. The reason is simple. If you *join the Union* it will cost them money. The more you make the more it cost them. It is worth it for them to spend a little now to buy your votes if they can save it later.
30. To those of you who have just started at Clorox I would ask you to consider that before the new shift was added virtually every employee *joined the Union*. Right now the Company is trying to be very good to you so that you will *vote against the Union*. Ask some of the older employees about the way things were before *the Union*. If *the Union* is not *voted* in Clorox will most likely go back to the way it did things in the past.
31. You can have a say in your future. You can gain the strength to win real improvements and real security.
32. You can do so by *voting for the Union* on Friday.

Sincerely,

JCN:ds

J. Cameron Nelson
Barrister and Solicitor
Business Agent L.U. 304.

Mark "X" opposite your choice
IN YOUR EMPLOYMENT RELATIONS WITH
The Clorox Company of Canada Ltd.
DO YOU WISH TO BE REPRESENTED BY

Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers <i>Local Union 304"</i>	YES
	NO

[original emphasis deleted and
new emphasis and paragraph
numbers added]

Counsel for the employer points to the sample ballot, the Diversey (Canada) Ltd. example and specific references to the Local in the newsletter as factors which would have confused an ordinary employee into thinking he was voting for the Local rather than the National.

16. Nelson readily admits that the sample ballot at the end of the newsletter was a mistake in that it depicts Local 304 rather than the National as the union upon which the employees would be voting. By way of explanation, which the Board accepts, Nelson testified that in his haste to get the newsletter out, he and his secretary used a sample ballot that the Local had previously used in one of its campaigns. His secretary whited out the irrelevant name and inserted "The Clorox Company of Canada Ltd.". They forgot, however, to also white out "Local Union 304".

17. Local 304 is the union certified as the bargaining agent for the employees at Diversey (Canada) Ltd. In paragraphs 7 through 12, Diversey is highlighted as an example of the benefits of unionization. Nelson indicated in his testimony that he mentioned at the meeting of employees on or about August 26th that it was Local 304 that had bargaining rights at Diversey. Instead of referring to the union at Diversey as "Local 304", however, the letter uses the terms, "this union" and "the union". While some employees may have realized that the Diversey example was referable to Local 304 rather than the National, the Board cannot conclude on the totality of the evidence that this example was sufficiently misleading, standing either alone or together with the rest of the evidence, to cause the ordinary employee to be confused as to which union he would be voting for on August 31st.

18. There are approximately three direct references to the Local in the text of the newsletter (see paragraphs 14, 19 and 26). Nelson testified that the reason he referred to the Local at certain points in his letter was because some of the misrepresentations in the company's original letter related to locals rather than the National. Nelson indicates, for example, that the reference in paragraph 19 to strike money payable by the Local flows from the erroneous statement in the employer's letter that "[m]aximum benefits payable during a strike are \$40.00 per week ...". Additionally, Nelson testified that the reference in paragraph 14 stating that "your Local has never fined anyone ..." stems from misleading statements made in the company's letter concerning disciplinary and expulsion procedures which were alleged to emanate from local union by-laws. Apart from clarifying misrepresentations, Nelson admits that he was, to some extent, campaigning on behalf of his own local in hopes that following a successful vote for the National, the employees would exercise their option of transferring their allegiance to Local 304. We note, for example, paragraph 26 which tells employees how long "our Local union" has protected its members from unfair labour practices.

19. The employer's complaint about the Local's application is rooted in its perception of the Local's participation in the National's campaign. The employer does not complain about the conduct of the Local's campaign for the instant application. We note that the instant application is supported by fresh membership evidence in the name of Local 304. In asserting that the bar against the National imposed following its loss of the August 31st representation vote should be imposed against Local 304, counsel for the employer relies solely on the allegation that the employees were so confused and misled by Nelson's newsletter and general rhetoric promoting Local 304 during the last weeks of the campaign that they thought they were voting for Local 304 on August 31st rather than the National. Counsel emphasized that Nelson's participation had particular impact because it occurred in what he described as the "dying moments of the campaign".

20. Having evaluated the campaign in its entirety, from June through August, the Board is not persuaded that Nelson's statements on behalf of Local 304, his erroneous sample ballot or his several references to the Local in the newsletter would have confused employees into thinking that they were in fact voting for the Local rather than the National. A careful review of the newsletter written by Nelson reveals that all references to voting upon and joining the union, save the sample ballot, are to "the union" rather than "the Local". (see, for example, paragraphs 2, 3, 5, 28, 29, 30 and 32). At the outset of the campaign, the evidence establishes that Rannachan and McNamee carefully explained the structure of the union to the employees and emphasized the clear separation between the National and the locals. The evidence supports the conclusion that from the beginning the employees realized that several options would flow from joining the National, one of which was to join a local if they so desired.

21. Employees signed union cards in the name of the National; they received two newsletters from Rannachan on National stationery; they voted on August 31st on a ballot which set forth the National, not the Local, as the entity to be voted upon. To decide that the employees were so confused by Nelson's presence in the campaign and his newsletter that they thought they were voting for Local 304 instead of the National, would require the Board to conclude that the employees couldn't retain clear explanations given by Rannachan and McNamee about the union's structure, couldn't remember what union they actually joined, couldn't recognize a mistake in the newsletter and couldn't read and comprehend the ballot they actually cast on August 31st. Having confidence in the intelligence of the average employee the Board is simply unwilling to draw such conclusions.

22. For the reasons given above, therefore, the Board concludes that the six month bar it imposed against the National does not operate against the Local. The application is, therefore, timely.

23. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at Bramalea, Ontario, save and except supervisors, foremen, persons above the rank of supervisor or foreman, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

24. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on November 30, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

25. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER J. A. RONSON:

1. It is the usual practice of the Board that a "time bar" of six months be imposed against an unsuccessful applicant for certification where a representation vote has been held and the applicant fails to obtain the necessary majority. The rationale can be found in: *the*

Watson Manufacturing Company of Paris Limited [1968] OLRB Rep. Aug. 441, at para 5; *Campbell Soup Company* [1968] OLRB Rep. Feb. 1091, at para 17; and *The Bristol Place Hotel* [1979] OLRB Rep. June 486, at para 6.

2. The imposition of such a bar against a local union does not prevent a sister local from applying for certification for the same employee within the time period. *Pinehill Auto Ltd.* [1968] OLRB Rep. July 375; *Swingline of Canada Ltd.* [1971] OLRB Rep. Nov. 710.

3. More recently the Board has held that the imposition of such bar against a local union does not prevent the intertional (of the same union) from applying for certification for the same employees within the time period. *Elm Tree Nursing Home* [1978] OLRB Rep. Nov. 984. Now, as a result of this case, the imposition of such a bar against a national union will not prevent one of its locals from applying for certification for the same employees within the time period. The mere fact that the same organizers have been involved in both applications is not a governing consideration.

4. As matters now stand, the imposition of a time bar against a national or international union or one of its locals will have little or no practical effect on that particular union, as the prohibition problem can be easily solved. Whether this is fair to the small "independent" union, the employees or the employer, in view of the reasoning behind the imposition of a bar, remains a matter for future reflection.

5. The Board considers membership in a local union as being *prima facie* evidence of membership in the national or international. The union's evidence in this case was that all members in good standing of all locals were also members of the National. Whether a vote against the National is also a vote against all its locals is a question I need not attempt to answer in this case since I am convinced by the evidence that on August 31, 1979 the employees voted explicitly against both the National and Local 304.

6. Mr. Rannachan testified that at the outset of the first campaign by the National he explained carefully to the employees the options open to them once the National was certified; they could become part of an existing local; they could form their own local; or they could remain simply members of the National and be serviced by it. The practicality of the third option is questionable in view of his testimony that he is a member of Local 304 and that, to his knowledge, all members of the National are also members of its various locals.

7. Mr. Nelson, the business agent for Local 304, admitted that during his involvement in the first campaign, he took advantage of the opportunity and tried to convince the employees to join Local 304 after the certification vote. At the meeting of employees on August 26, 1979, as one of his "selling points", he explained to the employees that it was Local 304 that had negotiated a collective agreement with Diversey (Canada) Ltd., a company that had dealings with Clorox.

8. As I understand the argument of counsel for the employer, the involvement of Local 304 in the first organizing campaign resulted in the employees voting against not only the National but also Local 304. An examination of the letter of August 27, 1979 by Mr. Nelson (set out in paragraph 15 of the majority decision) reveals:

- (a) it is written under the letterhead of Local 304;

- (b) save for para 19 of the letter, the words 'National' or 'National Union' are conspicuous by their absence;
- (c) the terms 'this Union' and 'the Union' are used interchangeably to refer to Local 304 when the contract with Diversey (Canada) Ltd. is referred to in paragraphs 7, 8 and 12 of the letter. (At the employees' meeting on August 26th, Mr. Nelson told them that the Diversey contract was with Local 304);
- (d) in paragraph 14 of the letter, Local 304 is referred to as '... this Union, your Local ...' The only way a Clorox employee can interpret such a reference is that Local 304 will be 'your Local' after the vote;
- (e) in paragraph 19 of the letter the employees are told that they will receive \$60.00 per week as strike benefits from 'the Local'. This statement of existing practice must refer to Local 304. How does a Clorox employee interpret this information in view of the three options open to him or her? Again, I believe, it is that Local 304 will be his or her local after the vote;
- (f) the sample ballot in the letter indicates a vote for or against Local 304;
- (g) Mr. Nelson signs the letter not as a representative of the National, but as business agent for Local 304;
- (h) the letter *from Local 304* is the last communication to the group of employees prior to the vote.

9. Bearing in mind that the employees were told that there were three options open to them if the National was certified and faced with the intrusion of Local 304 in their campaign, I do not feel that the employees differentiated between the National and Local 304. I have no hesitation in concluding that the majority of Clorox employees voted against:

- (a) the National;
- (b) the locals of the National and specifically Local 304; and
- (c) forming a separate local of their own.

I would hold that the applicant in this matter is bound by the bar placed by the Board on the National, or alternatively, that the application is untimely and should not be entertained so long as the bar against the National remains in effect.

1065-79-M Corby Distilleries Limited, Applicant, v. Distillery Workers' Union, Local 96, Respondent.

Employee – Reference – Whether watchmen employed as guards

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members H. Simon and E. J. Brady.

APPEARANCES: *K. W. Kort, D. S. McLean and W. M. MacDermott for the applicant; William Argue, Kenneth Burley and Werner Brauer for the respondent.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER E. J. BRADY:

1. This is an application under section 95(2) to determine whether certain persons are "guards" within the meaning of *The Labour Relations Act*.
2. This determination finds its significance in section 11 of the Act, which states as follows:

"The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards."

While the section simply refers to "a person employed as a guard to protect the property of an employer", this Board long ago determined that the term "guard" in the context of that section must be given a more restrictive meaning than might otherwise appear, being confined essentially to persons whose duties raise the real possibility of a conflict of interest with respect to fellow employees in a bargaining unit. It appears that the meaning of this provision was first considered by the Board in the case of *Geo. A. Crain & Sons Ltd.*, 63 CLLC ¶16,241. In finding the rationale for the provision in a decision which in fact pre-dated its enactment, the Board commented (at page 1208) that in that earlier case "... the character and degree of monitorial and admonitory authority exercised by the guards over the production workers were such that the Board was compelled to conclude that if both groups of employees were merged in a single bargaining unit the guards would be confronted with a serious conflict between their special responsibilities to their employer on the one hand, and their loyalty to fellow bargaining-unit employees on the other." The Board went on to add: "As it is only the special nature of a guard's actual or potential relationship to other employees which can render him vulnerable to a conflict of loyalties, the principal characteristics which determine his status as a 'guard' within the meaning of the legislation, must somehow be connected with this relationship".

3. In the present case, the persons in dispute have been referred to for a number of years as "watchmen". However, as the Board also stated in the *Geo. A. Crain* case, *supra*:

“Whatever the semantics, the mere designation of a person as ‘a guard’ or as ‘a watchman’ cannot *ipso facto* place him in the named category”. That question must be determined by the Board on the basis of a full examination of the person’s duties and responsibilities.

4. The present group have, as well for a number of years, been members of the production bargaining unit represented by the respondent trade union. In seeking their exclusion after these several years, the applicant relies in particular on changes made in the written instructions of the procedural manual provided to the watchmen in question, such changes taking place in August of 1978. The witness examined by the Board, Mr. Maher, acknowledged that the changed manual did come into effect at that time, although he could not recollect anyone specifically going through it with him. The applicant feels that two unreported drinking incidents of which it is aware, one in November 1976 and the other in August of 1979, highlight the difficulty it now faces with the “watchmen” being included in the production employees’ bargaining unit. The applicant feels that, as a manufacturer and bottler of alcoholic beverages, the problem is a particularly serious one.

5. The evidence establishes that there are five persons in the “watchmen” category, and they between them provide 24-hour, 7-day-a-week coverage of the employer’s premises. The watchmen all wear uniforms, do not carry firearms, and are not sworn in as any kind of special constables. They are the only security personnel on the premises. There is only one gate left unlocked so as to provide access to and from the premises, and it is monitored from the Time Office by the watchman on duty. The watchmen have regular rounds to make for the purpose of fire control checks, etc. on the evening and midnight shifts, and on weekends, but do not make such rounds on the busy day shift. They monitor and record the entry and exit of all vehicles, including any employee vehicles arriving or leaving outside of shift-change times.

6. The portions of the Instruction Manual which could have a bearing on this application are as follows:

“7) COMPANY VEHICLES, EMPLOYEE VEHICLES, EMPLOYEES
ENTERING PLANT

• • •

- (c) The watchman will record all employee vehicles, staff or payroll, entering or leaving the plant at all times.
- (d) No hourly paid employee is to be allowed in plant if not reporting for duty, without pass signed by an authorized person. Permission to enter will also be permitted if Watchman has received verbal permission from an authorized person. Watchman will record details on entries and exits form, whether walking or driving.
- (e) If an employee, hourly paid or staff, enters or leaves the plant at anytime other than normal hours or regular shift change hours, the watchman will record details on entries and exits form, whether walking or driving.

• • •

8) INSPECTION

- (a) The watchman will inspect or search any person or vehicle leaving the plant if so instructed by his foreman, superintendent or plant manager.
- (b) The Watchman will hold any vehicle or persons at the gate if deemed necessary and call his foreman, superintendent or plant manager."

7. Mr. Maher testified that no one checks the employees in and out at shift changes, and that he himself has no authorization to carry out checks on lunch pails, parcels, etc., unless instructed by management to do so. This is borne out by paragraph 8(a) of the Instructions. On the other hand, Mr. Maher knows that it is his responsibility to report anything unusual that happens during his shift. This would include any employee that he suspected of being intoxicated, or attempting to steal something. Mr. Maher does not feel that he has the authority to actually detain someone if he feels that is necessary, but paragraph 8(b) of the Instructions in fact gives him that express authority. He also acknowledges that he has the authority to keep out any unauthorized persons, including employees who may be off shift.

8. Following the November 1976 incident mentioned above, the company issued a memorandum to all of the watchmen warning them of the consequences of failing to report instances involving other employees. Mr. Argue, on behalf of the respondent trade union, points to the fact that the watchmen were asked to keep that message "confidential". As well, Mr. Argue points to the relative paucity of evidence supporting the company's concern that watchmen in the past have been reluctant to report incidents involving their fellow employees. We agree with counsel for the applicant, however, that both of these points just as arguably are indicative of the very problem with having the watchmen included in the bargaining unit, and these points therefore are of little assistance to the Board.

9. This case is not dissimilar from the *Imperial Leaf Tobacco Company of Canada Limited* case, [1969] OLRB Rep. Feb. 1168. The employees there in question to perhaps an even greater degree than here in general carried the indicia of what might be termed "watchmen", rather than "guards". They were, however, expected to ensure that employees did not remove large parcels from the plant without written authorization. There was no evidence that any of the watchmen in fact ever became involved with another employee in the exercise of this responsibility. The Board concluded as follows:

"Whether the watchmen have in fact stopped employees at this plant with respect to large parcels it remains uncontradicted that they have the expressed authority to do so and as well to search the parcels. There is then an element of monotorial authority over the employees in the bargaining unit which, having regard to the nature of the respondent's business, cannot be ignored. A guard may not necessarily have had to exercise, during a certain period of time, all the powers which he might have in respect to his position. Similarly the watchmen in this case have not had an occasion to use all the authority attaching to their job, but in our opinion there is sufficient evidence of conflict of interest between these employees and those in the bargaining unit to which the Board must give weight in its findings."

10. As in the *Imperial Tobacco* case, the company's product is of a nature and size such as could make the temptation for petty theft or unauthorized use a legitimate concern. In spite of this, security arrangements at this plant do not appear particularly tight, but the fact remains that to the extent that a monitoring function does not exist in the plant, it is performed by the persons in the category of "watchmen" and has been expressly assigned to them (particularly in paragraphs 7 and 8(b) of the Instructions). Further, as noted, Mr. Maher was aware of his specific responsibility to report the kinds of matters about which the company is concerned.

11. On balance, therefore, the Board concludes, as in the *Imperial Tobacco* case, that because of the real potential for conflict of interest, these persons must be treated as "guards" within the meaning of section 11 of *The Labour Relations Act*, and excluded from the bargaining unit of production employees.

DECISION OF BOARD MEMBER, H. SIMON:

1. Having regard to the evidence in this case, I find that the employees concerned are performing duties as "watchmen" not as "guards" and therefore should remain part of the plant employees' bargaining unit.

0006-79-R International Union of Operating Engineers, Local 793,
Applicant, v. **Esam Construction Limited**, Respondent, v. Group of
Employees, Objectors.

Bargaining Unit – Construction Industry – Whether employees working off-site coming within bargaining unit.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Balentine.

APPEARANCES: B. Fishbein and J. Redshaw for the applicant; Rodney D. Dale and Douglas W. Magrath for the respondent; Peter R. Lockyer and Ian C. Wallace for the objectors.

DECISION OF THE BOARD; February 13, 1980

1. The applicant has filed this application for certification with respect to its usual craft bargaining unit of operating engineers in the Board's geographic area #3. The respondent and the objectors are in agreement with the applicant with respect to the bargaining unit.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*.

4. The applicant has challenged the inclusion of certain names on the schedule "A" which has been filed by the respondent. At the meetings convened by Mr. D. McNabb, Labour Relations Officer, the parties resolved some of the applicant's challenges to the schedule "A". At the commencement of the examination of the persons who gave evidence before the Labour Relations Officer, the parties agreed that schedule "A" consisted of at least the following persons who were engaged in the occupational classifications which appear adjacent to their names:

Dan Cadotte	Crane Operator
Scott Crockard	Bulldozer Operator
George Kitson	Crane Operator & Maintenance
Stan Moore	Crane Operator
Adam Sauve	Crane Operator
Joe Soares	Crane Operator

The applicant challenged the inclusion on schedule "A" of the following persons who, according to the respondent, were engaged in the occupational classifications which appear adjacent to their names:

Danny Bembridge	Loader Operator
Bruno Chelchowski	Maintenance & Crane Operator
Don Dunham	Maintenance & Crane Operator
Drew Kane	Loader Operator & Maintenance

5. On the date of the making of this application the respondent was engaged in the construction of four apartment buildings at a site on Proudfoot Lane in London known as Forest Hill. Proudfoot Lane is a lane which lies to the south of Oxford Street West. The respondent also operated to the north of Oxford Street West a pre-cast and ready-mix batching plant, a repair and welding shop, a garage and a servicing and storage area for equipment on the Esam dirt road. These facilities are used as a support area by the respondent for the construction of the apartment buildings. The distance between the construction of high-rise apartments on Proudfoot Lane and the facilities on the Esam dirt road is about one kilometer. In order to travel from the facilities on the Esam dirt road to the construction site on Proudfoot Lane it is necessary to proceed in a southerly direction along the Esam dirt road, then in a westerly direction along Oxford Street West, which is a four-lane highway, and then in a southerly direction along Proudfoot Lane. The respondent maintained time clocks on both locations. The immediate area around these two locations is in a state of development from an area which was generally wooded into mixed commercial and residential development. There is not a clear and unobstructed view between these two locations.

6. Danny Bembridge, Bruno Chelchowski, Don Dunham and Drew Kane each gave evidence before the Labour Relations Officer. Mr. Bembridge was initially hired by the respondent about six years ago as a labourer. He was employed by the respondent as a labourer for two years. For the last two years he has been employed by the respondent as a batcher. On the date of the making of this application he was classified by the respondent as a loader operator. As far as he remembers he was running the batching plant on that date. Mr. Bembridge described his job as involving the loading of a bin with sand and stone with a loader. At least half of his day is occupied with running the loader. For the rest of the day he runs the plant. This involves weighing the cement and charging the trucks. Most of the mate-

rial goes to the construction site at Forest Hill. About a quarter of the material is sent to the respondent's pre-cast plant which is adjacent to the batching plant. However, the output from the batching plant goes to the construction site at Forest Hill.

7. Mr. Chelchowski has been an employee of the respondent for three years. He was hired as a crane operator and is a licensed hoisting engineer. Since he was hired he has been promoted to chief mechanic and he is also licensed as an "A" mechanic. Mr. Chelchowski gave evidence that on the date of the making of this application he started the morning by working on a mobile crane at the pre-cast and ready-mix batching plant. Subsequently, there were problems with another crane and he went with his partner, Don Dunham, to the construction site at Forest Hill where he worked for about three hours. Afterwards he repaired a fork lift at the same construction site. On other days he has operated a traveller crane to unload concrete shingles and load a trailer. On these days he operates the crane for about forty-five minutes in the afternoon with the rest of his time being spent in maintenance and repair work. Mr. Chelchowski reports to work in the morning at the garage. While he was able to give detailed evidence concerning his activities on the date of the making of this application he was unable to remember what he did on the next working day.

8. Don Dunham was hired by the respondent as "supervising equipment and repairs, cranes" a few months before the date of the making of the application. He described the normal course of work in a day as repairing breakdowns on the job with respect to cranes, 'dozers, front end loaders, ready-mix trucks and welding machines. He physically handles tools and either repairs such equipment or has someone else perform such repairs. Mr. Dunham reports to the respondent's superintendent, Hank Koemraads. He gave evidence that on the date of the making of this application he was engaged in crane repairs or crane checks. Mr. Dunham was referred to records of the respondent and indicated that on April 2, 1979, the date of the making of this application, he was engaged in repairing the number one mixer in the cement plant. He also made reference to climbing tower crane on the construction site. However, it appears to the Board that the reference in the records to climbing tower crane on the construction site refers to April 3, 1979, and not to April 2, 1979. The respondent's records indicate that for the six working days prior to April 2, 1979, Mr. Dunham was engaged in, for the most part, repairing and servicing cranes and trucks at the construction site for about three hours each day.

9. Drew Kane has been an employee of the respondent for about four years. He commenced working for the respondent in maintenance and gardening and then progressed into construction work. Mr. Kane gave evidence that on the date of the making of this application he was driving a cement truck and that he had been driving a cement truck for about two years. During the winter he drives a loader in connection with snow removal. On occasions Mr. Drew has operated a front end loader in the absence of the regular operator. However, he was unable to confirm a suggestion by the respondent that he operated a front end loader in the absence of Jim Copeland on the date of the making of the application.

10. Hank Koemraads, the respondent's superintendent, gave evidence with respect to the work performed by Mr. Kane on the date of the making of this application. He stated that on that date Mr. Copeland did not report for work and that he gave instructions that Mr. Kane was to operate the front end loader at the Forest Hill construction site. Mr. Koemraads also gave evidence that he saw Mr. Kane operate the front end loader on that date and expressed the view that he would have operated it for the entire day.

11. Mr. Kane's time cards were shown to him. However, he was unable to recall in what capacity he was working for the respondent on the date of the making of this application. Further evidence by Mr. Koemraads on the respondent's practice with respect to setting its time clocks failed to shed any light on what Mr. Kane was doing on the date of the making of this application.

12. Bernard McMillan, a business representative of the applicant, and three employees of the respondent, Stan Moore, Dan Cadotte and Adam Sauve, gave evidence with respect to their observations of the work performed by Messrs. Bembridge, Chelchowski, Dunham and Kane on the date of the making of this application.

13. Mr. McMillan gave evidence that Messrs. Chelchowski and Dunham worked in the shop and that Mr. Bembridge worked at the batching plant. He also gave evidence that the pre-cast building is a steel building which is approximately thirty feet across the front and sixty to eighty feet in depth. This building has an overhead crane inside it and a concrete floor. Attached to it or as part of the same building is the ready-mix batching plant. He described the batching plant as a permanent batching plant rather than a mobile batching plant. Mr. McMillan also described the garage as a permanent steel building in the shape of a dome. He gave evidence that on the date of the making of this application he observed that both of the respondent's tower cranes at the Forest Hill construction site were working during the morning and during the afternoon. Mr. McMillan gave evidence that the tower cranes were the only cranes at the construction site which would need to be jacked and that it was impossible for a crane to work and be jacked at the same time. He gave evidence that no cranes were being jacked on the date of the making of this application.

14. Stan Moore was employed by the respondent as a crane operator on the date of the making of this application. On that date he operated a mobile crane and was loading pre-cast shingles out of a form and on to a semi-trailer at the pre-cast plant. By nine o'clock in the morning he had finished this job and he drove his crane to a gas station and took on fuel. Mr. Moore then drove his crane to the construction site at Forest Hill and reached there at ten o'clock. At the commencement of that morning there was a mechanical problem with the mobile crane. The problem was attended to by Mr. Chelchowski in the garage. Mr. Moore gave evidence that Mr. Kane is a ready-mix driver and that on the date of the making of this application he saw him at the pre-cast building driving a ready-mix truck from approximately 7:30 a.m. until 9:00 a.m. Mr. Moore then observed Mr. Kane leave the pre-cast yard driving a rubber-tired front end loader in the direction of Oxford Street. At ten o'clock in the morning Mr. Moore again observed Mr. Kane coming from the construction site on Proudfoot Lane heading in the direction of Oxford Street. Mr. Moore did not see Mr. Kane again on the date of the making of this application for certification.

15. Mr. Moore also gave evidence that he did not see Mr. Chelchowski either present on the construction site or repairing a fork lift. There were two fork lifts on the construction site. One of the fork lifts was stationed in front of his crane during the entire day. The other fork lift was owned by the bricklayers and not by the respondent. Mr. Moore gave evidence that the bricklayers and not the respondent maintained their own fork lift. He also gave evidence that neither of the cranes on the construction site was jacked on the date of the making of this application. Mr. Moore never saw Mr. Dunham on the construction site on that date but he did see him at the garage during that morning where he was either repairing a ready-mix truck or a front end loader. While Mr. Moore punches a time clock at the plant,

he performs ninety per cent of his work at the construction site. He punched the time clock at the plant rather than the construction site because he is required to take his machine to the plant as his last duty each day. The front end loader is also returned to the plant at the conclusion of the day's work.

16. Dan Cadotte was employed by the respondent as a crane operator on the date of the making of this application. The crane he operated is a Manotouwalk Model 300 Crawler which runs on a track. He commenced work on that day by punching in at the construction site at 7:30 a.m. and moving jacks. Mr. Cadotte gave evidence that Mr. Kane drives a cement truck for the respondent and that on April 2, 1979, he observed Mr. Kane with a rubber-tired front end loader. He stated that Mr. Kane came to the construction site between 8:30 a.m. and 9:00 a.m. and that Mr. Kane was driving the front end loader which was normally driven by Mr. Copeland. Mr. Cadotte stated that after the coffee break Mr. Kane used the front end loader to move some cement beams. He later observed Mr. Kane drive on the access road away from the construction site at around 10:00 a.m. After that time Mr. Cadotte neither saw Mr. Kane nor the front end loader at the construction site on April 2, 1979.

17. Mr. Cadotte gave evidence that he did not see Mr. Chelchowski repairing a fork lift at the construction site on the date of the making of this application. Moreover, he did not see Mr. Chelchowski at the construction site on that date. Similarly, he gave evidence that he neither saw a crane being jacked at the construction site nor saw Mr. Dunham at the construction site on that date. The witness explained that it was impossible for a crane to be jacked on that date without his being aware of it.

18. Adam Sauve was employed by the respondent as a hammerhead crane operator on the date of the making of this application. On that date he was working at the construction site and observed Mr. Kane driving a loader between 9:00 a.m. and 10:00 a.m. and pouring concrete in the afternoon. Mr. Sauve saw Mr. Kane at the construction site with his cement truck after 2:30 p.m. on the same date. The witness did not see any cranes being jacked on the date of the making of this application.

19. There is a conflict between the evidence of Mr. Chelchowski, Mr. Dunham and Mr. Koemraads on the one hand, and the evidence of Mr. McMillan, Mr. Moore, Mr. Cadotte and Mr. Sauve on the other hand. The three last mentioned persons, however, made notes of what happened on April 2, 1979, the date of the making of this application, and gave their evidence from their notes. On the other hand, the respondent's records, which were placed in evidence before the Board, do not support the testimony of Mr. Chelchowski, Mr. Dunham and Mr. Koemraads. In these circumstances, where there is a conflict in the evidence, the Board accepts the evidence of Mr. Moore, Mr. Cadotte and Mr. Sauve in preference to the evidence of Mr. Chelchowski, Mr. Dunham and Mr. Koemraads who were apparently relying solely on their memories.

20. Mr. Kane's evidence is of little value to the Board in determining the work he performed on April 2, 1979. The Board finds that on that date Mr. Kane was engaged for about an hour in driving a front end loader and was also engaged in pouring concrete. His usual job was driving a cement truck and he drove a cement truck during April 2, 1979.

21. Mr. Bembridge was engaged in performing his normal job of operating the batch-

ing plant on April 2, 1979, and in the course of his work he used a front end loader for at least half of that day. Mr. Chelchowski and Mr. Dunham perform both repair work on the respondent's equipment at the construction site and also operate cranes from time to time. The Board finds that on April 2, 1979, neither Mr. Chelchowski nor Mr. Dunham worked on the construction site jacking cranes, but rather worked on the respondent's facilities on the Esam dirt road which is north of Oxford Street West.

22. The respondent has employees working on the construction site and at its facilities on the Esam dirt road. The distance between, by road, is one kilometer. The structures on the dirt road are apparently of a permanent nature and there is some evidence that the facilities will also be used in conjunction with future projects of the respondent. In our opinion, the facilities are not to be regarded as part of the construction site and employees who work there are not on-site employees. The Board expresses no opinion if the facts had established that the facilities of the Esam dirt road had been of a temporary nature and intended to be operational merely for the Forest Hill construction site.

23. The Board now considers the list of employees for the purpose of the count. Prior to the enactment of *The Labour Relations Amendment Act, 1970 (No. 2)*, S.O. 1970, c. 85, s. 39, the Board excluded shop and yard and other off-site employees from bargaining units which were determined in applications for certification filed under the construction industry provisions of *The Labour Relations Act*. The enactment in 1970, however, introduced a broad definition of "employee" in the construction industry. This definition now appears in section 106(b) of the Act. Section 106(b) states:

"In this section and in sections 107 to 124,

• • •

(b) 'employee' includes an employee engaged in whole or in part in off-site work but who is commonly associated in his work or bargaining with on-site employees."

24. In the *Taggart Construction Limited* case, [1974] OLRB Rep. March 190; and the *C. A. Pitts Engineering Construction Ltd.* case, [1973] OLRB Rep. Feb. 123, the Board considered the provisions of section 106(b). In those two cases the Board determined that if off-site employees were only rarely, uncommonly and briefly required to work on-site they were not appropriate for inclusion with on-site employees. In the instant application Mr. Chelchowski and Mr. Dunham were not working on the construction site on April 2, 1979. However, these two employees clearly do spend time on the construction site on other days on a regular basis and the Board finds that they are commonly associated in their work with on-site employees within the meaning of section 106(b). The Board therefore includes Mr. Chelchowski and Mr. Dunham on the list for the purpose of the count because they are engaged in either operating or repairing equipment referred to in the bargaining unit.

25. Mr. Bembridge appears to be engaged solely in off-site work. However, he is engaged in operating equipment which is referred to in the bargaining unit and he is apparently engaged solely in work which in its entirety is destined directly or indirectly for the construction site. The Board finds that he is engaged solely in the flow of work to the construction site and that he is commonly associated in his work with on-site employees. Mr. Bembridge is therefore included in the list for the purpose of the count.

26. Mr. Kane was regularly employed as a cement truck driver and on the date of the making of this application he was employed in a variety of tasks such as driving his cement truck, pouring cement and briefly as a driver of a front end loader. In the construction industry it has been the practice of the Board where employees engaged in the work of different crafts (and where they are paid only one rate) to characterize the craft in which they are employed for a majority of their time as the one governing their status on an application for certification. See the *Johnson-Kiewit Subway Corporation* case, [1966] OLRB Rep. June 182; the *O. J. Gaffney Limited* case, [1964] OLRB Rep. Aug. 233; the *McNamara Construction of Ontario Limited* case, [1964] OLRB Rep. Dec. 419; and the *Nedan Forming Company Limited* case, [1965] OLRB Rep. May 100. The Board finds that Mr. Kane spent by far the majority of his time on April 2, 1979, either driving a cement truck or pouring cement and only about one hour in driving a front end loader. In the absence of any evidence that he was paid more than one job rate, the Board is not prepared to find that he was paid more than one rate. Accordingly, the Board classifies Mr. Kane as a driver of a cement truck and not as an operator of equipment which is included in the bargaining unit. Mr. Kane is therefore not included in the bargaining unit for the purposes of the count.

27. The list for the purpose of the count therefore consists of: Dan Cadotte, Scott Crockard, George Kitson, Stan Moore, Adam Sauve, Joe Soares, Danny Bembridge, Bruno Chelchowski and Don Dunham for a total of nine persons. The applicant filed evidence of membership of the type referred to in paragraph twenty-eight on behalf of five of these nine persons.

28. In this application for certification the applicant filed two combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six month period immediately preceding the terminal date of the application. The money was collected by one person. The applicant also filed three proof of membership documents. The documents are signed by the members, indicate that the persons in question are members in good standing of the applicant and also indicate that monthly dues of \$15.00 have been paid for at least one month within the six month period immediately preceding the terminal date of the application. The documents contain a certification by an officer of the applicant that the person signing the document is in fact a member in good standing. The applicant also filed a duly completed Form 54, Declaration Concerning Membership Documents, Construction Industry.

29. The Board further finds that all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

30. There was also filed in opposition of this application for certification a statement of desire signed by eight persons. The names of three of these persons appear on the list of nine employees for the purposes of the count. However, there is no overlap between the names of the persons who signed the statement of desire and the persons who signed evidence of membership in the applicant. It is not necessary for the Board to inquire into the origin, preparation and circulation of this statement of desire because the applicant has un-

challenged evidence of membership for more than fifty-five per cent of the employees in the bargaining unit referred to in paragraph 29. The Board finds no reason in the exercise of its discretion to direct the taking of a representation vote.

31. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on April 10, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

32. A certificate will issue to the applicant.

0140-79-R Ontario Public Service Employees Union, Applicant, v. Family Services of Hamilton-Wentworth Inc., Respondent.

Employee – Employees members of Board of Directors of non-profit corporation – Whether excluded by section 1(3)(b)

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Chris G. Paliare for the applicant and Wm. S. Challis for the respondent.*

DECISION OF THE BOARD; February 21, 1980

1. Two interim certificates were issued to the applicant by an earlier decision of the Board under section 6(1a) of *The Labour Relations Act*. One for a unit of full-time employees and another for a unit of part-time employees and students. At the time, the parties were in dispute as to whether several classifications should be included in or excluded from both bargaining units. The parties have agreed on the disposition of all classifications, except that of employee members of the Board of Directors (of whom there were three at the date of application), as set out hereafter. The classifications of office supervisor and home economist – youth residence are agreed to be excluded from the units under section 1(3)(b) of the Act. The classifications of nursery school head teacher, senior youth care worker and co-ordinator of the Hamilton Psychiatric Hospital Living Skills Programme are agreed to be included in the unit. The Board notes the agreement of the parties that the clarity note in paragraph 5 of the Board's decision incorrectly lists the classification director, Hamilton Psychiatric Hospital Living Skills Programme, the correct classification being co-ordinator as above-referred. The Board notes further agreement of the parties that the evidence of Darlene Mosca in respect of the classification of employee members of the Board of Directors ("employee-directors") shall be representative of herself, Jan Callan and Rod Watson, the person in the classification at the date of application.

2. The Board has received the report of the Labour Relations Officer who inquired into the matters in dispute and the written and oral submissions of the parties thereon.

Having reviewed and considered the report and the submissions of the parties the Board finds as follows.

3. The respondent is a corporation without share capital incorporated under *The Corporations Act*, R.S.O. 1970, c. 89, as amended. The respondent is comprised of persons who have become members by making application and paying at least two dollars in annual dues. At an annual meeting of members a Board of Directors is elected to carry out the purposes and objects of the respondent's charter which are:

“TO offer assistance to families disorganized by environmental or personality factors or other conditions for the purpose of creating and maintaining wholesome family life, to promote a sound community life, to encourage education and training for social work, and generally to develop, encourage and work for the welfare of the individual and the best interests of society in all matters affecting family and community life;”.

The respondent also employs persons who perform the work required to satisfy those purposes and objectives. There is a history over at least twelve years of employees being elected to the Board of Directors and recently, prior to this application for certification, names of employees were recommended to the nominating committee of the Board of Directors by a staff (i.e. employee) association to stand for election to that board. The application for certification has raised the issue of whether employee-directors should be excluded from the bargaining unit because they exercise managerial function or are employed in a confidential capacity in matters relating to labour relations. Neither party contends that the three persons who are employee-directors exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations in their role as employees. The respondent contends that, in their role as directors, they are so engaged. Consequently, the Board should find that, as employee-directors, they fall within the section 1(3)(b) exclusion. The applicant contends that neither the Board of Directors nor the employee-directors exercise managerial function. Thus it is necessary for the Board to examine the role of the Board of Directors in the management of the respondent's business and, more particularly, the role of the three employee-directors.

4. The full complement of the Board of Directors is 35. Normally only two are employees, but, at the time of this application, there were three because of a transitional situation. The parties do not expect that this situation will endure beyond the present term of office. It is not clear from the evidence why the respondent has employees on its board. Mosca states that the employee-directors are not on the Board of Directors as representative of the employees. She admits that there has been confusion amongst directors about the role of the employee-directors and it is reasonable to infer from her evidence that the other directors perceive them as representing the employees because the employee-directors have been asked on particular subjects to canvass employee reaction. The employee-directors volunteer to stand for election and they carry out this responsibility on their own time, not the respondent's and receive no extra consideration for being employee-directors. The Board of Directors meets ten times per year and in the two months when it does not meet, its executive committee carries out its functions subject to later ratification by the directors. Recently the respondent adopted the practice of having the Board appoint a “delegated management committee” which is a committee consisting of 21 directors who are prepared to be available

on a regular basis for meetings. At least two of the three employee-directors are included in this committee. Seven of the ten directors' meetings are meetings of this committee and the three remaining ones are designated as full board meetings. The actions of the committee are ratified at the next following meeting of the full board. For all practical purposes, the committee is the Board of Directors and when reference is made herein to the functions and actions of the latter, it includes both.

5. The Board of Directors relies primarily on the paid professional and administrative staff of the respondent to implement the objectives, policies and programs which it has approved. The executive director is at the head of this staff group and is responsible directly to the Board of Directors. He in turn has two executives, the director of administrative and personnel services and the director of professional services, who report to him and are responsible for the delivery of all approved programs of the respondent to the community and for the general administration of the respondent. The Board of Directors is assisted also by an extensive committee organization which is made up of two groups of committees. One group is the corporate standing committees which are concerned essentially with the ongoing administration and operation of the respondent as indicated by their names, for example: personnel; program and planning; and finance, budget and property. The other group is the service committees. These are ad hoc committees and reflect primarily the services and programs which the respondent is delivering to the community. The service committees change from time to time depending on the changes in emphasis and direction of the respondent's programs. While all committees report to the board, they maintain close liaison with the administrative and professional staff and, as will be seen later in this decision, sometimes become closely involved with the implementation of decisions of the Board of Directors. The liaison function is achieved in part by the make-up of the committees which includes one management and two non-management staff along with three directors.

6. The Board of Directors and the committees reach decisions on a consensual basis or, failing consensus, by majority vote. The evidence indicates that employees are encouraged to attend the meetings even if they are not members of the board or committee and to participate in the discussions. All actions and decisions of the board are collective ones and no director has authority (except within certain narrow limits) to commit the respondent in external business matters or exercise internal managerial authority.

7. It is appropriate to begin an examination of the Board of Directors functions within this organizational format with the source of its authority, the respondent's Letters Patent, which designate the Board of Directors as the Committee of Management of the Corporation. As such, the Board of Directors is empowered to make by-laws and regulations for the control, management and conduct of the affairs of the Corporation. This is in keeping with section 313(1) of *The Corporations Act*, supra, which requires that "The affairs of every corporation shall be managed by a Board of Directors howsoever designated.". The report of the Labour Relations Officer reveals that the Board of Directors, in fulfilling its role of managing the affairs of the respondent, performs a wide range of functions which impact on all aspects of the respondent's operations and many of which directly affect or involve the respondent's employee relations.

8. The Board of Directors deals regularly with the source and application of funds including:

- (a) approving the operating budget and monitoring revenue and expense results under it;
- (b) approving the fee for service (i.e., price) structure;
- (c) deciding to cancel, modify or add programs, freeze salaries or defer filling vacant positions in order to balance expenses with revenue;
- (d) approving all commercial contracts;
- (e) approving all specific expenditures such as purchase of chattels, capital repairs and property maintenance.

It determines the respondent's organization and establishes the job content for senior management positions. In addition to item (c) above, some other examples of decisions which impact on the respondent's employee relations are:

- (a) approving conditions for laying off staff;
- (b) approving changes to employee benefits;
- (c) approving individual leaves of absence;
- (d) hiring and firing key staff;
- (e) approving salary adjustments for all staff;
- (f) allocating staff and programs to specific geographical areas or locations within the broad geographical community served by the respondent; and
- (g) alternative solutions for dealing with staff workload problems.

While the respondent's written personnel policies and practices show that the Board of Directors was the final level of appeal under section VI – grievance procedure of the document setting out the policies and practices, Mosca's evidence is that the board has not been called upon to deal with any grievances during her experience.

9. The evidence in the Officer's report reveals the two groups of committees referred to above to have an active role in the management of the respondent. They receive, evaluate, modify and approve recommendations of administrative staff in respect of the policies, procedures and programs of the respondent and in turn recommend the particular action to the Board of Directors for final approval. A simple example is the role of the finance, budget and property committee in the preparation of the respondent's annual operating budget. The committee reviews the budget proposals for the respondent's various operational elements and the consolidated budget, where necessary directs that they be revised and, after the committee has approved them, recommends the budget proposals to the Board of Directors for its approval. In this process, the committee reviews information on current and projected staff salaries and staffing levels by program. This committee is involved also in the

ongoing review of actual revenue and expense results compared with the budget. When variances show revenue shortages or surpluses exist in particular programs, the committee will review those with the administrative staff involved, decide what action should be taken and recommend that action to the Board of Directors for its approval. The process in both examples often involves other standing committees such as the program and planning committee, or the personnel committee or a service committee responsible for a particular program such as the youth residence committee. This latter committee is an example of the role played by the service committees in monitoring for the Board of Directors the operation of the respondent's programs. It determines admission criteria for the residence, reviews with the head of the residence the programs offered to the residents and takes an active part in the maintenance of the residence. Thus through these kinds of activities the committees perform an important co-ordinating function between the Board of Directors and the various administrative and program elements of the organization as well as amongst those elements. As well as providing an advisory function to the Board, the committees also advise the professional and administrative staff and other committees. The functions performed by the committees are very similar to those for which the staff specialists are commonly employed in other organizations. For example, the personnel committee develops personnel policies and procedures, reviews benefits and salary scales, work usually done by personnel specialists in larger organizations. Similarly, the finance, budget and property committee can be likened to the financial analyst.

10. This approach to managing the respondent's operations involves constant consultation and inter-play between the Board of Directors, the committees, the administrative staff and employees. The Officer's report contains ample evidence of this inter-play and Mosca's evidence shows it to be a constant factor in the management of the respondent's affairs. The inter-play between the Board of Directors (or the President acting for the directors) and the administrative staff occurs either directly with the executive directors or through one of the committees. When it occurs through a committee, it may be with the executive director, one of his two subordinate executives or a program head, as in the example of the youth residence committee's dealings with the head of the youth residence. Employees individually and in groups are consulted and encouraged to participate in a wide range of matters such as search committees and other hiring procedures, task forces, reviewing and assessing changes in personnel policies and procedures and the respondent's fee for service schedule. Thus the consultation inter-play extends well beyond the Board and committee functions. This consultative approach to decision-making notwithstanding, the evidence leaves no doubt that the final decision-making authority is exercised by the Board of Directors once the consultation is finished, not only in respect of introducing, modifying or cancelling policies and programs, but also in respect of the implementation of policies and programs, as evidenced by some of the functions set out in paragraph 8 herein.

11. In view of the scope of the Board of Directors functions, it is not surprising that the directors have frequent access to and utilize in the decision-making process, confidential information in matters related to labour relations. This may take the form of salary expenses for each of the various service programs or information which shows the staffing impact of alternative action responses to an imbalance of revenue and expenses for a particular program. There is some conflict in the evidence of Mosca and John Vedell, the executive director, as to whether employee-directors have access to this kind of information or participate in the decisions related thereto. Having regard to the evidence as a whole, the Board finds on balance that the evidence supports the view that the employee-directors have abstained

from participating in decisions which affect individual members of the staff or from which they would benefit personally as employees.

12. It is within the context of these facts that the Board must determine if employee-directors of the respondent fall within the exclusions of section 1(3)(b) of the Act which provides as follows:

- “1. (3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,
 - (b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

These exclusions serve to draw a line between those persons who are not entitled to bargain collectively under the protective umbrella of the Act and those persons who are. The importance and purpose of this distinction has been commented on by the Board many times and recently it stated as follows in *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396:

“The identification of management is fundamental to the scheme of collective bargaining as set out in the Labour Relations Act. What is contemplated is an arm’s length relationship between the employees represented by a bargaining agent, on the one side, and the employer acting through management on the other side. The Act attempts to create a balance of power between these two sides by insulating one from the other. Employees, therefore, are protected from management interference and domination by the prohibitions against employer interference with trade union and employee rights. Management, by the same token, is protected by excluding from collective bargaining either persons exercising managerial functions, or persons employed in a confidential capacity in matters relating to labour relations. Collective bargaining rights, therefore, are not universal, but must be qualified by the need to preserve a countervailing force on the employer side.”

There are two competing precautions inherent in applying the section 1(3)(b) exclusions: the need, on the one hand, to shield the employer from potential conflicts of interest and the trade union from management interference (as is evident from the Board’s comments in *Chrysler, supra*); and on the other hand, the awareness that persons who are captured by these exclusions are denied access to the collective bargaining process. In our case we are dealing with persons whom the parties acknowledge are not excluded from the Act by reason of their duties and responsibilities as employees of the respondent, but who would be excluded only if this Board finds that, as employee-directors, they:

- (a) exercise managerial function, or
- (b) are employed in a confidential capacity in matters relating to labour relations.

13. The facts demonstrate that the Board of Directors is clearly fulfilling the obliga-

tion placed on it by the respondent's articles of incorporation and by section 313(1) of *The Corporations Act, supra*, to manage the affairs of corporation. While the Board relies primarily on the respondent's paid professional and administrative staff to implement the approved policies and programs for the achievement of the corporation's objectives, the Board of Directors has retained to itself some significant management responsibility. Most of the activities set out in paragraph 8 are ones which are usually part and parcel of the implementation role of management. Moreover the close supervision given by the Board of Directors to the professional and administrative staff, directly and through the board's committees, is akin to that exercised by a chief executive officer in a more typical corporate organization. Consequently we must conclude that the Board of Directors collectively exercises managerial function. Within this format, however, the respondent has encouraged staff, both management and non-management, to participate in and contribute to the policy setting and decision-making apparatus of the organization by:

- (a) the use of staff on committees of the Board of Directors;
- (b) the participation in pre-decision deliberations of the Board of Directors of staff who are not directors,
- (c) the involvement of staff in search committees, the assessment of job candidates and task forces;
- (d) the consulting of staff on matters relating to conditions of employment; and
- (e) the election of staff on the Board of Directors.

All of this demonstrates a clear and purposeful effort of the respondent to install throughout the organization a consultative approach to decision-making. Thus, even though the Board of Directors reserves to itself the ultimate decisions on matters of policy, programs and some implementation actions, these decisions frequently are made only after the significant participation of all levels of the organization.

14. It is clear that the Board is dealing in this case with a situation containing some special features. The respondent, whatever the source of its original inspiration, has seen fit to follow a participative and consultative approach to the management of its affairs. The applicant, at least to the extent that it is maintaining that the employee-directors should *not* be excluded from the bargaining unit, is not opposed to this system of management and gives no indication that having bargaining unit employees serve on the Board of Directors under these circumstances is a threat to the applicant's exclusive bargaining rights for the non-management staff. How do we apply to this situation the Board's traditional tests for identifying whether a person is employed in a confidential capacity or exercises managerial function, tests which have evolved out of labour relations in the industrial context? The Board, having regard for the constantly evolving nature of labour relations, has found it necessary to be cautious in applying its tests in a new or different context; to not apply them in a mechanical fashion and to deal with each situation on its own facts. In this respect see, for example, the Board's comments at paragraph 9 and 10 of its recent decision in *Spar Aerospace Products Ltd.*, [1979] OLRB Rep. July 700 in which the Board was called upon for the first time to determine the managerial exclusion in a scientific and professional engineering set-

ting. There is, in our view, additional reason for caution in this case. At a time when much attention is being focused by governments and participants in and observers of the industrial relations scene on techniques for modifying some of the negative influences of the adversarial aspects of the collective bargaining process, it seems appropriate to the Board that it should be judicious in the application of its criteria for exclusions to the status of the employee-directors in this case so as not to disturb the existing style of management.

15. Turning first to the question of whether the employee-directors are employed in a confidential capacity in matters relating to labour relations, it is true that the Board of Directors regularly makes decisions about such matters. The employee-directors, however, have excluded themselves or have been excluded by the Chairman of the Board from participating in some such decisions. The evidence indicates also that they do not usually receive the confidential information relevant to those decisions. If this is not always the case and they do sometimes come into possession of confidential information on labour relations matters, would this be sufficient in all the circumstances of this case to apply the confidential exclusion? We think not. The Board has consistently held that, in order for a person to be "employed in a confidential capacity in matters relating to labour relations" he must have a regular, material involvement in such matters and not merely be exposed to the confidential information in some incidental manner. Furthermore, in the absence of a need for the person to have the information because of the job in which he is employed, the mere coming into possession of the information is not sufficient to create the conflict of interest contemplated by section 1(3)(b). (In this respect see the Board's comments in *York University*, [1975] OLRB Rep. Dec. 945 at p. 951). This is particularly so in this case where the potential for acquisition of confidential information is not related to the jobs which the employee-directors are engaged to do and where it is fully within the control of the respondent to protect itself against the disclosure of confidential information to the employee-directors if it believes it might be adversely affected by that disclosure. We conclude therefore that the employee-directors are not captured by the confidential exclusion.

16. The question as to whether the employee-directors exercise managerial function raises an important issue for the Board in its application of section 1(3)(b). The problem which commonly faces the Board when it is dealing with managerial function is to determine what is the lowest level in the organization at which managerial function is exercised. In this case we are examining the participation of employees in their role as directors at the highest level of a corporation at which managerial function may be exercised. Furthermore, the examination is taking place, as noted above, in a milieu where the respondent has promoted the involvement of employees generally in the decision making process. The persons in question are part of that involvement in their primary roles as employees. They are also part of it in their secondary role as directors. It is agreed that they do not exercise managerial function in their primary role, but can it be said that the functions which they fulfil in their secondary role constitute the exercise of managerial authority within the meaning of section 1(3)(b)?

17. In seeking the answer to that question, it is useful to consider generally the following comments of the Board in *Caledon Hydro-Electric Commission*, [1979] OLRB Rep. Oct. 924, in which it was considering the application of its "effective recommendation" test for managerial function.

"Modern corporations encourage the free flow of information and

ideas from subordinates to superiors. Consultation, and involvement in the decision making process, improves communication in both directions, clarifies the employer's problems and objectives, increases employee morale and makes optimum use of employee ingenuity and creativity. 'Participatory management styles' have become a prevalent technique in large organizations for reducing employee alienation, and increasing commitment to the goals of the employer. (See generally P. Blumberg, *Industrial Democracy: The Sociology of Participation*, Constable, London, 1968.) In small organizations consultation is inevitable because of the small number of individuals who must work together effectively if the goals of the organization are to be accomplished. *One should not conclude, however, that the existence of consultation and an apparent 'democratization' of decision making means that managerial authority has begun to percolate downwards. . . .*" [emphasis added]

That very caution finds meaning in a decision of the Board in *Carleton University*, [1975] OLRB Rep. June 500. The Board was faced with determining whether, in a bargaining unit of academic staff and librarians, departmental chairmen who report to faculty deans were the first level of supervision. Deans were agreed to be managerial. After examining the collegial nature of the decision-making process in the academic setting of a university and how that process operated at the departmental level within that setting, the Board found that the decisions on important matters such as hiring, tenure, promotion and dismissal were made collectively by all academic members of a department. It concluded, therefore, that the chairmen did not perform functions sufficiently different from their faculty colleagues to warrant excluding the departmental chairmen from the bargaining unit. Thus the fact that the university organization encouraged collective decision-making by those persons who would be affected by the decision (i.e. faculty members of the department including their chairman) did not make them managers. The Board came to a similar conclusion in *University of Windsor*, [1977] OLRB Rep. May 300 and in the process also rejected the proposition that faculty were by definition managerial because of their participation in the group decision-making process.

18. While the situation in our case is not the same as the university environment, it is somewhat analogous. Decisions, including decisions of the Board of Directors are made only after canvassing and giving account to the views of employees. As in Carleton, prolific use is made of committees in the decision-making process and for providing liaison between inter-dependent groups in the organization. The analogy appears to end with the role of the employee-directors in the process. In Carleton, issues are decided collectively at the faculty (i.e. employee) level, or, in other words, the decision-making process has been brought to the employees. In our case the employees (who are employee-directors) have been elevated to where the decisions are made by the board. We think this distinction is more apparent than real and is just a different technique for involving employees in the decision-making process and as in Carleton, it does not *per se* make them managers.

19. Bearing in mind that we are dealing with the secondary function of these persons and not the primary one and it is only in respect of the secondary one that they have responsibilities which might distinguish them from their fellow employees; furthermore, since all the decisions of the Board of Directors are collective ones and no director has individual authority to commit the respondent in external business matters or exercise internal manage-

rial authority, this Board cannot conclude that the employee-directors are called upon to exercise the kind of independent decision-making authority which demonstrates that they exercise managerial authority within the meaning of section 1(3)(b). The Board is satisfied, in the circumstances of this case, that the applicant and the respondent are each in a position to protect its own interest should either one see the employee-directors as posing a 'conflict of interest' risk if they are included in the bargaining unit. It is open to the applicant to bargain any protection which it deems necessary and for the respondent to control the information made available to the employee-directors and to require them to abstain from participating in discussions and/or decisions where it deems such participation to be adverse to its collective bargaining relationship with the applicant. Moreover, should the collective bargaining relationship between the parties develop in a manner which is incompatible with placing employees on the Board of Directors, the respondent could terminate the arrangement.

20. For all of the above reasons and having regard to all of the facts in this case, particularly:

- a) the nature of the respondent's "business", its organization and the composition of its work force;
- b) the respondent's established practice of seeking some employee representation on its Board of Directors;
- c) the involvement of employees in the decision-making process by means of the respondent's participatory and consultative style of management; and
- d) the applicant's acceptance of the employee-directors as being appropriate for inclusion in the bargaining unit,

we find that the employee-directors are properly included in the bargaining unit. We want it to be clear, however, that in reaching this decision on the facts and circumstances existing at this time, we do not consider this to be a case for devising *per se* rules. At another time, with different facts, a different conclusion could result. Even in this case, further development of this participative managerial process within the collective bargaining relationship may cause either party to ask for re-examination of the status of employee-directors.

21. Before concluding this decision, the Board notes with approval the statement of the respondent made through counsel in its written submissions and repeated in the hearing that it intended to continue this commendable practice of having employee representatives on its Board of Directors regardless of the outcome of this Board's decision. That attitude speaks well for the prospect of the parties being able to fashion an approach to their collective bargaining relationship which will preserve that practice and enhance the collective bargaining relationship.

22. In summary, having regard to the agreement of the parties, the Board finds that the positions of office supervisor and home economist – youth residence are excluded from the bargaining unit and the following positions are included in it: nursery school head teacher; senior youth care worker; and, co-ordinator of the Hamilton Psychiatric Hospital Living Skills Programme. The Board further finds that employee-directors are included in the bargaining units. Thus the composition of both bargaining units is finally resolved.

23. The Board finds, accordingly, that all employees of the respondent at Hamilton, Ontario, save and except director, persons above the rank of director, secretary to the executive director, office supervisor, home economist – youth residence, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining and comprise bargaining unit #1.

24. The Board further finds that all employees of the respondent at Hamilton, Ontario, who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except director, persons above the rank of directors, secretary to the executive director, office supervisor and home economist – youth residence, constitute a unit of employees of the respondent appropriate for collective bargaining and comprise bargaining unit #2.

25. For purposes of clarity the term director appearing in the exclusions in both units describes:

director of professional services,
 director of administrative and personnel services,
 director of counselling,
 director of family life program,
 director of living skills program,
 director of credit counselling,
 director of youth residence,
 co-ordinator of the Hamilton
 Psychiatric Hospital Living
 Skills Programme.

26. Formal certificates will now issue to the applicant.

1868-79-R Faultless-Doerner Manufacturing Inc., Stratford, Ontario
 Employees Association, Applicant, v. **Faultless-Doerner Manufacturing Inc.**,
 Respondent.

**Certification – Trade Union Status – Employer referring employees to lawyer to form union
 – Employer permitting use of its premises for organizing meetings**

BEFORE: Rory F. Egan, Vice-Chairman, and Board Members S. H. Lewis and E. C. Went.

APPEARANCES: *Robert C. Kellington and Jeannette C. Germain for the applicant; Eric Bridges and Clifford Schott for the respondent.*

DECISION OF THE BOARD; February 8, 1980

1. The name of the respondent is amended to read: "Faultless – Doerner Manufacturing Inc."

2. This is an application for certification in which the applicant is required to satisfy the Board that it is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. Section 1(1)(n) of the Act reads as follows:

"1.-(1) In this Act,

(n) 'trade union' means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

4. The evidence disclosed that following the unsuccessful attempt by an outside union to gain certification, the management referred the association to a person who had been employed by the company in labour relations matters and whom the witness described as "a union buster". The Vice-President of the association told the Board that he was advised by the company's solicitor that he would have to deal directly with this consultant. This the Vice-President did. He obtained a draft of the by-laws from the consultant which he altered to suit the purposes of the association. He also testified that management had discussed the legality of the association with respect to the right to strike. Management had also advised the association when it had failed to elect officers to elect a panel for the purposes of negotiating. The evidence was that the progress of the association in adopting by-laws and proceeding to certification was discussed with management. While it appears that there was no direct input into the by-laws by management, there were discussions with respect to the content, in particular with regard to the right to strike. There were three or four organizational meetings held in the company cafeteria at which all employees attended and while those were, in the main, held at lunchtime and it had been the custom of the association to meet there, the meetings did run over into paid time.

5. Having in mind the continuing interference by the company with the affairs of the association and the company's interjection of itself into the attempt to change the association's status into that of a trade union, the Board finds that the applicant is not a trade union within the meaning of the definition set out above.

6. Furthermore, section 12 of the Act provides:

"The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin."

It follows that even if status were granted to the applicant, the Board, upon the above evidence, would be prohibited from certifying it because of the provisions of section 12.

7. The Board, in view of all of the foregoing, has no recourse but to dismiss the application.
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1038-79-R Canadian Union of Fast Food and Service Workers, Applicant, v. The Great Canadian Pizza Company (Division of 401825 Ontario Limited), Respondent, v. Group of Employees, Objectors.

Certification – Representation Vote – Manager acting as employer scrutineer – Section 7a application dismissed – New vote ordered

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: Shalom Schachter and Graham MacIsaac for the applicant; Gary R. Clewley for the respondent; Marlene Graham and Frank Bottke for the objectors.

DECISION OF THE BOARD; February 6, 1980

1. This is a continuation of an application for certification. In an earlier decision the Board reviewed the origination of the applicant trade union and granted it status as a trade union. Pursuant to the direction of the Board, a representation vote was held on December 13, 1979. The applicant lost that vote by a margin of 5 to 3, but on the basis of the alleged misconduct on the part of the employer, together with certain irregularities in the manner in which the vote was held, now requests the Board to certify it pursuant to the Board's powers under section 7a of *The Labour Relations Act*, or alternatively, to order that a new representation vote be held, with corollary relief.

2. The evidence in support of this request was, in the main, presented to the Board through the person of Graham MacIsaac, the President and founder of the applicant. Mr. MacIsaac is an employee of the Great Canadian Pizza Company, and appears to be in his mid-teens.

3. The parties had previously attended at the Board's premises on November 22nd for a hearing in connection with the application. At that time they executed Minutes of Settlement with respect to a number of matters, including the withdrawal of a number of section 79 complaints filed by the applicant against the employer. One of the terms of settlement was that the employer reinstate four employees, including Mr. MacIsaac, and compensate them in an agreed upon amount. Mr. MacIsaac testified that he understood that the payment was to be made the next day, which was Friday. He told the Board that he attended at the employer's premises on Friday and asked for the cheques for himself and the other three employees. The employer, Mr. Domet, according to Mr. MacIsaac, asked him if he would accept a lesser amount than that agreed upon. Mr. MacIsaac flatly refused to discuss it. Mr. Domet then said that MacIsaac would have to wait until he, Domet, could contact his lawyer. In the meantime, Mr. Domet asked Mr. MacIsaac to come into his office. Already present in the office were Jim Crocker, whom Mr. MacIsaac alleged to be a body-

guard for Mr. Domet. While Mr. MacIsaac was waiting in the office, Mr. Domet's brother arrived as well. Mr. MacIsaac testified that Mr. Domet's brother called him a thief for taking the money, stated that all unions were corrupt, and then compared him to Jimmy Hoffa. Mr. MacIsaac received the three paycheques and left.

4. On cross-examination Mr. MacIsaac was very specific as to the time of day when all of this occurred. He testified that he first called Mr. Domet around 4 o'clock to inquire about the money, as he had not heard back from his lawyer. Mr. Domet at first refused to see him. Mr. MacIsaac persisted in trying to arrange a meeting before the banks closed, and finally arranged to see Mr. Domet at about 5:30 p.m. He specifically denied having attended at the employer's premises any earlier on that day, in particular, around the noon hour.

5. Mr. MacIsaac further testified that he attended the employer's premises on Monday to pick up his own cheque. Mr. Domet produced a cheque dated November 23, 1979 and asked Mr. MacIsaac to sign a receipt for November 23rd (the Friday). Mr. MacIsaac refused, and Mr. Domet then changed the date on the cheque.

6. Under the Minutes of Settlement, it was agreed that Mr. MacIsaac would return to work on November 30th. However, it turned out that Mr. MacIsaac had a prior commitment of which he was unaware, and he was excused at his request from working on that date. His first day back at work was in fact December 8th. Mr. MacIsaac's job is that of a delivery-driver and he spends a considerable amount of time at the employer's premises between deliveries. On the first night back of work, Mr. MacIsaac testified that he and Mr. Domet began to engage in idle talk about how the union got started. Mr. MacIsaac then asked Mr. Domet if he had anything to do with the petition. According to Mr. MacIsaac, Mr. Domet responded that he had talked to his lawyer and then to one employee, Gail McGarry, but that he did not force it. Mr. MacIsaac then carried on with his work. He testified that he later became curious as to whether or not Mr. Domet was talking to the other employees about the union. Accordingly, he came into the building where he could not be seen. He testified that he heard Mr. Domet say to Mr. Bottke, another employee, that until Mr. Bottke got his dollar back, he was still committed to the union. Mr. MacIsaac said that Mr. Domet saw him and asked him to come in. After Mr. Domet left, Mr. Bottke asked for his dollar back, to which Mr. MacIsaac said that it was up to all of the members. Mr. MacIsaac further testified that Mr. Domet returned a short while later, and in the ensuing conversation commented that the Ayatollah Khomeini was a communist. Mr. Domet then added that Mr. MacIsaac was a communist as well, and compared him to the Ayatollah. Mr. MacIsaac then entered into discussion with the other employees, who were on their break. These included Mr. Bottke and Mrs. Graham. Mr. Domet was also present. Mr. MacIsaac told the Board that he began talking about the union, whereupon Mr. Domet shouted that he did not want any talk about the union, that there wasn't going to be any union. Then, according to Mr. MacIsaac, he pushed Mr. MacIsaac up against the wall.

7. The remainder of Mr. MacIsaac's evidence dealt with the manner in which the representation vote was held on December 13th. On the day of the vote, the Returning Officer attending at the employer's premises for the purposes of conducting the vote invited Mr. MacIsaac, as the union's scrutineer, to go downstairs and inspect the arrangements for the vote. Mr. MacIsaac was shown an area just outside Mr. Domet's office which had been set up as a polling booth. At this point Mr. MacIsaac began to voice his concern to the officer about the presence of an individual named "Rocky" in the upstairs premises. The officer re-

plied that that was not a matter which he could discuss, and that, if anything, it was a matter for the Board. The officer asked whether Mr. MacIsaac was objecting to the place where the vote was to be held. Mr. MacIsaac replied that he was not. Mr. MacIsaac then testified that he entered the office of Mr. Domet, where the ballot box was situated, and was disturbed to find that Mr. Domet was the company's scrutineer. Mr. Domet and the Returning Officer were sitting side by side behind Mr. Domet's desk with the ballot box directly in front of them. The scrutineer for the objecting employees, Mr. Baxtead, was seated on the opposite side of the desk. The only chair left for Mr. MacIsaac was off in one corner of the room. Mr. MacIsaac conceded that he voiced no objection to that arrangement, explaining to the Board that he had been discouraged by his earlier attempt to raise an objection with the Officer. When the vote was over and the ballots counted, Mr. MacIsaac refused to sign the Board's usual form which indicates lack of objection to the manner in which the vote was held.

8. Respecting the vote, the applicant also complains that Gail McGarry, an employee who had openly declared herself as anti-union, was scheduled by Mr. Domet to be at work that evening while the vote was being held, whereas, according to Mr. MacIsaac, she normally works only the day shift. The polls were open from 4 to 8 p.m. Finally, the applicant objects to the continuous presence of the individual referred to as "Rocky" at the employer's premises while the vote was being conducted.

9. As a result of a comment being made by Mr. Domet in his evidence, the Board also permitted the applicant to adduce the evidence of Mr. Gino Toth with respect to an incident that took place in August of 1979. Mr. Toth has never been an employee of The Great Canadian Pizza Company, but was at the employer's premises one day and overheard Mr. Domet say to Mr. MacIsaac and another employee, Steve Ballentine, that anyone who supported the union would be fired.

10. The evidence of the employer, Mr. David Domet, conflicts with that of Mr. MacIsaac on virtually every material point. Mr. MacIsaac had earlier left The Great Canadian Pizza Company on his own, and Mr. Domet testified that at that time he re-employed him, he was well aware of Mr. MacIsaac's views on unions, the two having had many friendly discussions about that and other subjects in the past. With respect to Friday, November 23rd, the day on which Mr. MacIsaac attended at the employer's premises to collect the monies owing under the Minutes of Settlement, he testified that Mr. MacIsaac first came to the premises around 12:30 in the lunch hour. According to Mr. Domet, Mr. MacIsaac accused him of breaking the agreement and lying and demanded his money at once. When Mr. MacIsaac ultimately returned at 5:30 in the afternoon, Mr. Domet indicated to him that he had the cheques for the other three employees ready but that it would take some time to look up the necessary deductions for Mr. MacIsaac. Mr. MacIsaac stated that that was no problem, that he would take the cheques for the other employees and return on Monday for his own. Mr. Domet testified that his only question to Mr. MacIsaac was whether one week's severance pay which had been given to Mr. MacIsaac at the time of his termination could now be taken off the amount otherwise owing under the reinstatement agreement. He testified that Mr. MacIsaac replied, "Let's let the lawyers decide" and Mr. Domet said, "That sounds good". Mr. Domet explained that the back-dating of the Monday cheque was simply an attempt to reconcile his payroll records.

11. With respect to the December 8th "pushing" incident, Mr. Domet testified that

he came upon Mr. MacIsaac upstairs in the shop persistently asking another employee, Mrs. Graham, what Mr. Domet had done to change her mind about the union. Because of the commotion, Mr. Domet asked Mr. MacIsaac to confine such discussions to non-company time. Mr. MacIsaac insisted that it was his right to discuss the matter, and began shouting examples of why the union was needed in the shop. Mr. Domet testified that Mr. MacIsaac pushed him two or three times, and pushed Mrs. Graham as well. Mr. Domet threatened to call the police if Mr. MacIsaac would not settle down, and ultimately Mr. Domet did so. Mr. Domet admits that he called Mr. MacIsaac a communist in the heat of the argument.

13. Mr. Domet testified that the arrangements for the vote were made by the Returning Officer. He testified further that in a telephone conversation with the Officer the night before, Mr. Domet indicated that he was having trouble coming up with a scrutineer because of the time of the vote. The Officer replied, according to Mr. Domet, that as Mr. MacIsaac was going to scrutineer for the union, Mr. Domet could do so for the company. With respect to the seating arrangements for the scrutineers the next day, Mr. Domet testified that he had gotten an extra chair for Mr. MacIsaac and had placed it in the office. Mr. MacIsaac came into the office and sat down next to him but Mr. Domet asked him to move. Mr. Domet testified that he asked Mr. MacIsaac to do so in order to avoid any argument. Mr. Domet denies that any scheduling changes were made that day, or that he had asked "Rocky" to be present on the premises during the vote. He disclaimed any responsibility for initiating an employee petition, and for prompting Mr. Bottke to ask for his dollar back. He stated that he never compared Mr. MacIsaac to the Ayatollah Khomeini, nor referred to unions in general as communists. He testified that he had asked Mr. Crocker to attend the meeting with himself and Mr. MacIsaac in order to act as a witness, so that he could not afterwards be falsely accused of anything. He conceded that Frank Bottke's father had come to see him on an earlier occasion because Frank had signed a union card and had then become very concerned about it, but Mr. Domet testified that he simply told Mr. Bottke that it was "no big deal".

13. Another employee, Mrs. Marlene Graham, was called by the employer to give evidence with respect to the December 8th incident. She testified that she and Frank Bottke were working in the shop while Mr. MacIsaac was awaiting further deliveries. Mr. MacIsaac kept pressing Mrs. Graham to explain why she had changed her mind about the union, and Mr. Graham simply replied that she was tired of the whole thing and didn't want to discuss it. Mr. MacIsaac persisted and the situation developed into a shouting match between Mrs. Graham and Mr. MacIsaac, with Mrs. Graham trying to get Mr. MacIsaac to leave her alone. Mr. Domet then came upstairs and asked her what all the yelling was about. Mrs. Graham testified that she advised Mr. Domet that Mr. MacIsaac was arguing about the union and that she and Frank did not wish to talk about it. Mrs. Graham further testified that Mr. Domet then asked Mr. MacIsaac to please refrain from discussing the union during working hours, and that he emphasized the word "please". Mr. MacIsaac responded that it was his right to do so and Mr. Domet responded that it was not his right to do so when the other employees were working and did not want to discuss it. The matter then escalated into a three-way shouting match. It went on for some two or three minutes, according to Mrs. Graham, with Mr. MacIsaac leaning back against the shelf and Mr. Domet close in front of him, clenching his fists at his side. Mr. MacIsaac then put his hands on Mr. Domet's chest. Seeing the actions of both men, Mrs. Graham was concerned that there was going to be trouble and so attempted to intervene between the two. At this point Mr. MacIsaac swung around towards her, and his hand hit her shoulder. Mr. Domet told Mr. MacIsaac that if he

did not stop, he would have to call the police. Mr. MacIsaac responded, "Go ahead, you haven't got the guts". Mr. Domet did call the police, and when the officer arrived, he asked Mrs. Graham if he wanted Mr. MacIsaac to stop talking about the union. Mrs. Graham replied that she did.

14. Mrs. Graham further testified with respect to the day of the vote that the person known as "Rocky" was a friend of hers, and had come to the shop that evening to drop his girlfriend off at work, and to thank Mrs. Graham for helping her the previous night. She testified that he left after about 15 minutes and that, while he did return later than night, it was well after the vote was completed. Mrs. Graham admitted that she had recently been given by Mr. Domet an extra shift to work on weekends, but she testified that that was because no one else wanted it, and that she really did not want it either because of family commitments.

15. The evidence of Gail McGarry was that she was working at The Great Canadian Pizza Company on Friday, November 23rd, at around 12:30 in the afternoon, when she saw Mr. MacIsaac arrive and go over to talk to Mr. Domet. She heard Mr. MacIsaac mention the agreed upon money, and state that he had come to collect. She heard Mr. Domet reply that he did not have the cheques ready and then had to discuss it first with his lawyer. Mr. MacIsaac then left, but phoned several times, before arriving again in the late afternoon. With respect to her shift on December 13th, voting day, she testified that she worked 11 to 7, as she has done every Thursday since she began. The other days of the week she works 11 to 5.

16. Frank Bottke testified as well. He agreed that he had asked Mr. MacIsaac for his dollar back on December 8th, but denied that Mr. Domet had suggested that he do it. He also testified that Mr. MacIsaac gave him no reason for refusing to return the dollar. Mr. Bottke essentially confirmed the discussion that was going on between Mrs. Graham and Mr. MacIsaac about the union. He testified that when Mr. Domet showed up, he told Mr. MacIsaac he should not be talking about the union during working hours, that he was here to do his job delivering pizzas. Mr. Bottke testified that Mr. Domet and Mr. MacIsaac were "real close" and that he saw Mr. MacIsaac push Mr. Domet away, "to keep his distance". When the police officer arrived, he too was asked if he wanted Mr. MacIsaac to stop talking about the union.

17. Wade Domet, the brother of the owner, also gave evidence. He is not himself connected with the business, but visits the premises regularly to see his brother. He denies suggesting that Mr. MacIsaac was a thief or comparing him with Jimmy Hoffa.

18. The final witness for the company was Jim Crocker, the fourth party present at the discussion in Mr. Domet's office on November 23rd. He testified that Wade Domet did not actually call Mr. MacIsaac a thief, but that when he saw a pile of bills sitting on Mr. Domet's desk he asked his brother if the money should be left out. Mr. MacIsaac then asked Wade Domet if he was calling him a thief. According to Mr. Crocker, Wade Domet replied, "Well, I've heard something to that effect". Mr. Crocker could not recall any other conversation about unions. He testified that he had been asked by Mr. Domet to come down for that meeting in order to avoid an altercation. He denied, however, that he was in any way a security guard for Mr. Domet.

19. Mr. Crocker was a forthright and even-handed witness and the Board accepts his

version of what took place in Mr. Domet's office on November 23rd. The remarks were, however, directed to Mr. MacIsaac not by David Domet, but by Wade Domet, who is not part of the management of the business. More importantly, the remarks were made with no other employees present, and therefore, apart from displaying an attitude, cannot be said to have affected the ability of the employees to express their true wishes.

20. In requesting the Board to certify under section 7a, the applicant relies on an alleged breach of the Minutes of Settlement as establishing the necessary violation of the Act, pursuant to the provisions of section 79(6). However, establishing a mere violation of the Act is not sufficient. The violation must be of such nature that the true wishes of the employees are not likely to be ascertained by way of secret ballot. The applicant alleges in particular a violation of paragraph 4 of the Minutes of Settlement, which reads:

“The employer undertakes not to interfere in any way shape or form with the proposed union certification drive. Furthermore the employer undertakes to conduct himself in such a way that no prejudice or unfairness in any way shape of form will be directed towards any employee.”

Whether or not a violation of these Minutes has occurred, the Board does not find on the evidence which it accepts any conduct of the employer sufficient to prevent the true wishes of the employees from being ascertained. The Board would simply note that there appears to be nothing in the Minutes of Settlement which could reasonably be read as going so far as to permit an employee to campaign during working hours against the will of the other employees involved, to the point where a disruption of operations occurs. This the Board finds to have been the root cause of the incident which developed between Mr. MacIsaac and Mr. Domet on December 9th. In this regard, the Board accepts the evidence of Mrs. Graham and Mr. Bottke as the most plausible account of that entire incident. In general, the Board finds many of the allegations contained in Mr. MacIsaac's testimony non-supportable in the face of other credible evidence (even bearing in mind that the other witnesses called by the employer were all aligned in interest with him in one way or another). The Board is forced to conclude that Mr. MacIsaac's evidence to some extent suffers from the exuberance of youth, and his perceptions and recollections cannot wholly be relied upon. With respect to Mr. Domet's appellation of Mr. MacIsaac as “a communist”, the Board is satisfied that the other employees would be able to place this comment in perspective.

21. The only remaining piece of evidence on which the union could base a request under section 7a is the threat by Mr. Domet to Mr. MacIsaac and one other employee in August. This, however, was not deemed sufficient in itself by the applicant to support a 7a request at that time, and the Board does not find it sufficient now. While the Board does not conclude that Mr. Domet accepted the union's organizing campaign with the equanimity that he suggested in his testimony, the fact remains that the evidence falls short of demonstrating such conduct by the employer as would make it unlikely that the true wishes of the employees could be ascertained in a representation vote. Accordingly, the Board need not go on to address itself to the difficult question, also under section 7a of the Act, of whether or not the applicant in this case has membership support adequate for collective bargaining.

22. The Board does, however, have certain concerns over the manner in which the representation vote on December 13th was conducted.

23. The Board's main concern arises out of the fact that Mr. Domet elected to act as his own scrutineer. The Board's concerns in this regard are aptly set out in the *Scarborough Centenary Hospital Association* case, [1979] OLRB Rep. April 350, para. 10:

"The registrar in giving his instructions regarding the taking of representation votes recommends that rank-and-file employees be employed in this task. The Board does not, however, insist upon this as a precondition to the taking of a valid vote. In that a scrutineer is the representative of a party at the vote, the choice of the scrutineer ought to be left to the discretion of that party. Having said this, however, the Board recognizes that the choice of a scrutineer may in certain situations improperly affect the ability of bargaining unit employees to freely indicate their true wishes in the representation vote, and that consequently the choice of a scrutineer may be a factor in having a representation vote set aside. See *J. R. Menard Ltd.*, [1972] OLRB Rep. Oct. 915."

As can be seen from the above passage, the parties are given both the right and the responsibility of their own choice of scrutineer. This is embodied in the "Registrar's Instructions Regarding Vote" mailed to the parties. In this case, the respondent places reliance on the fact that, as Mr. Domet claims, his choice of scrutineer was made with the active endorsement of the Board's Returning Officer. The Board has never, however, allowed a party to escape its own responsibility by reliance on formal statements made by an officer or staff member of the Board (particularly since the perception or understanding of such conversations tends to be of a uniformly self-serving nature). In the choice of a scrutineer, only the party himself knows what his full options are, and what effect his presence at the vote, based on the full history of the matter, is likely to have on the freedom of the employees to express their true wishes.

24. Here Mr. Domet was faced with a real problem in the selection of a scrutineer, in that, apart from one newly-hired part-time employee, Mr. Domet was the only person in the organization who was not a member of the bargaining unit. Since the group of objecting employees were represented by a scrutineer with an interest identical to Mr. Domet's, Mr. Domet could, out of an abundance of caution, have foregone his own right to have a scrutineer. Having elected not to do so, however, it was in Mr. Domet's interest to ensure that the arrangements for the vote were as even-handed as possible. Instead, at Mr. Domet's insistence (and for motives which the Board accepts as innocent), the union's scrutineer, Mr. MacIsaac, ended up being seated in an area of the office removed from the specific point where the ballot box, the Board's officer and the other scrutineers were situated. This could cause employees to have an imbalanced perceptions of the conduct of the vote, and, bearing in mind the juxtaposition of Mr. Domet and the Board's officer, side by side, might raise doubts in employees' minds as to the very secrecy of the ballot itself. The Board is not suggesting that this was effected by design, nor that the conduct of anyone involved was "improper". But impropriety is not the issue. The issue is whether the Board can be satisfied, in all of the circumstances, that the Ballot accurately reflected the true wishes of the employees.

25. The Board is mindful of the fact that Mr. MacIsaac, the union scrutineer, was the organizer and President of the applicant. As the Board noted in the *Scarborough Centenary* case *supra*, the presence of a high-ranking union official may offset the presence of a simi-

larly-ranked management representative. In the present case, however, one must not lose sight of the fact Mr. MacIsaac remains a rank-and-file employee (as contemplated by the Registrar's instructions) and this factor limits both the impact which his presence might have on other employees in the unit, and the level of sophistication which the Board might expect from him. It is true that Mr. MacIsaac did not object to the seating arrangements in the office before the vote was counted. However, given his attempts to raise another matter with the Board's officer prior to entering the room, and the difficulty that a person in Mr. MacIsaac's position would have in understanding the difference between those matters with which the Returning Officer can deal, and those with which he cannot, limited weight can be placed on this failure to object in the circumstances.

26. Further, the evidence establishes that Mr. Domet had made the comment to certain bargaining-unit employees some four months previously that supporters of the union would be fired. The bargaining unit is small, and Mr. Domet the only member of management. In this case, Mr. Domet in every way personified the respondent's strong reaction to the union's organizing campaign. In contrast to the uninhibited atmosphere which the Board seeks to ensure by its 72-hour "silent period", it was Mr. Domet whom the employees encountered eye to eye as they came in to receive their ballot, and as they would be returning to place it into the ballot box. Considering all of this, together with the seating arrangements described above, the Board simply cannot be satisfied that the representation vote which took place on December 13, 1979, clearly reflected the true wishes of the employees in the bargaining unit. Accordingly, the results of that vote are hereby set aside and a new vote ordered in the bargaining unit described in the Board's decision of November 23, 1979.

27. All employees of the respondent in the bargaining unit on November 20, 1979 who do not voluntarily terminate their employment or who are not discharged for cause between November 20, 1979 and the date the new vote is taken, will be eligible to vote.

28. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

29. The matter is referred to the Registrar.

0658-79-U; 0659-79-U; 1076-79-U; 1077-79-U Ontario Nurses' Association, Applicant, v. Grey-Owen Sound Health Unit, Respondent.

Damages – Duty to Bargain in Good Faith – Lock-out violation of section 14 – Board awarding damages

BEFORE: R.O. MacDowell, Vice-Chairman and Board Members D.B. Archer and R. Redford.

APPEARANCES: Donald F. Hersey and Anita Deane for the applicant; John H.E. Middlebro and W.C. MacPherson for the respondent.

DECISION OF R.O. MacDOWELL, VICE-CHAIRMAN AND BOARD MEMBER D.B. ARCHER;

1. This is an application by the Grey-Owen Sound Health Unit (hereinafter referred to as "the employer") for reconsideration of a decision of the Board issued August 10th, 1979, [1979] OLRB Rep. August 751. The employer's application was heard together with two union applications: a request for damages under section 79 of the Act; and an application for consent to prosecute the employer pursuant to sections 85 and 90 of the Act. All of these matters arise from the same general fact situation, and the Board considered it appropriate to consolidate the proceedings and dispose of all of the outstanding issues at a single hearing and by a single decision.

2. The facts are not substantially in dispute and were extensively reviewed in the Board's August 10th decision. It may be useful, however, to refer to them again, briefly, in order to establish the context in which the two new applications arise.

3. The last jointly negotiated collective agreement between the parties expired on December 31, 1975. For some months thereafter the parties sought to negotiate the terms of a new collective agreement. One of the outstanding issues between them was the inclusion in that collective agreement of a provision which would require that *the next collective agreement* be settled by binding arbitration if the parties were unable to achieve a collectively bargained solution to this future dispute. The employer was not prepared to agree, in advance, to go to arbitration for the next agreement nor was it prepared to foreclose its right to resort to economic sanctions. As a result the negotiations reached a stalemate.

4. The parties decided that the way to resolve their deadlock was to refer *all* outstanding matters in dispute to an arbitrator, appointed pursuant to section 34c of the Act. One of these outstanding matters, of course, was the inclusion, in the collective agreement, of a clause which would provide for arbitration as the means to resolve *the subsequent* collective agreement. It is not disputed that the employer clothed the "section 34c arbitrator" with jurisdiction to prescribe the terms of a new agreement *and* to consider the inclusion in that agreement of an arbitration clause which would require resort to "a second round" of arbitration. (For ease of reference we shall refer to the arbitration pursuant to section 34c as the "first round" of arbitration; and the subsequent arbitration flowing from the section 34c arbitrator's award as the "second round" of arbitration.) Before the "first round" arbitrator the employer opposed the continuation of the arbitration process – in effect taking the same position as it had previously taken at the bargaining table – however, the arbitrator rejected the employer's arguments and decided that the disputed arbitration clause should be included in the collective agreement.

5. The employer remained adamantly opposed to a "second round" of arbitration, and sought judicial review of the arbitrator's jurisdiction to include this clause in the collective agreement. The employer's arguments were rejected by both the Divisional Court and the Court of Appeal. The Court of Appeal decision was issued February 5, 1979, and is now reported at (1979), 24 O.R. (2d) 510. For somewhat different reasons each of the learned judges decided that the first round arbitrator had jurisdiction to include the disputed clause in the collective agreement, and that, accordingly, resort to a second round of arbitration was "compulsory." The matter was referred back to the arbitrator for reconsideration of the form of clause which he had prescribed, but there is no doubt that the Court of Appeal was

unanimously of the view that the arbitrator could impose a “mandatory” provision which would bind the parties to resort to arbitration if they could not resolve their *next* collective agreement by negotiation. Unfortunately the Court decisions threw little light on a number of questions which, as a practical matter, were bound to arise: what was the status of the arbitration clause when the collective agreement, of which it was part, expired? How could non-compliance with the second round of arbitration be prevented? How was the second round arbitrator’s award to be transformed into a collective agreement? And, most important, how did the second round of arbitration affect the right to strike or lock-out – a statutory right which would accrue following expiry of the collective agreement and the completion of the statutory conciliation process?

6. The employer took the position that it was still entitled to lock out its employees in pursuit of its bargaining objectives. By letter dated July 4, 1979 the employer advised all of its employees that as at 4.30 p.m. Friday, July 13th, they would be “locked out.” It was the propriety of this lock-out which was the subject of the first union application to this Board and which resulted in our decision of August 10, 1979. The union contended that a strike or lock-out was the very thing which arbitration was designed to avoid and would be both “unlawful” and in defiance of the clear intention of the Court of Appeal. It is inconceivable, argued the union, that the Court could have intended that the parties could engage in a protracted strike or lock-out at the same time that they were obliged to resort to a “compulsory” arbitration process which would itself result in a new collective agreement. Such position, it was said, would undermine the arbitration process and vitiate the very purpose for which it was created. The employer contended, on the other hand, that it had complied with the statutory prerequisites of a lawful lock-out and that the “second round” arbitration mechanism had either disappeared with the collective agreement, of which it formed a part or, alternatively, could not abridge statutory rights which the employer was entitled to exercise. The employer maintained that it was entitled to engage in a lock-out despite the first round arbitrator’s award and the Court of Appeal decision.

7. The hearing before the Board occurred on July 13th, 1979 – that is, the day on which the lock-out was scheduled to begin. The legal issues raised were complex, and at the end of the day the Board indicated that it would reserve its decision. On its own motion the Board asked the employer for its position concerning the scheduled lock-out – noting that we had no jurisdiction to grant interim relief, that the propriety of the lock-out was the very issue before us, and that if the employer’s threat matured into a lock-out, we might then have to deal with the matter of damages. The employer was not prepared to await the Board’s decision. The lock-out was implemented, as scheduled, shortly after the completion of the Board’s hearing, and continued until Friday, August 10th, 1979, when the employer received the Board’s decision. The employer now seeks reconsideration of that decision. The union now seeks compensation, *inter alia*, for the wages lost by the locked out employees. The union also seeks consent to institute a prosecution for what the Board found to be the employer’s breach of section 14.

8. The procedural vehicle by which the matter was initially brought before the Board was an application under section 83 of the Act alleging “an illegal” lock-out. The statutory basis for “illegality” was not specifically pleaded. Much of the argument before the Board concerned the employer’s purported compliance with the statutory pre-conditions for a lawful lock-out (i.e., timeliness and conciliation) and the union’s contention that, notwithstanding this compliance, the employer’s conduct was illegal because of the “compulsory” arbi-

tration process to which we have already referred. Neither party addressed the effect of section 14 of the Act; however, on the basis of the agreed facts, the majority of the Board found that a lock-out, in the circumstances, constituted a breach of section 14.

9. The Board found that the parties had voluntarily, and specifically, clothed the arbitrator with the authority to prescribe a second round of arbitration, that a second round had been lawfully prescribed and that, therefore, neither party could now repudiate, or frustrate, the process by engaging in economic conflict. The parties had set in train an arbitration process, founded on section 34c, which limited their right to apply economic sanctions in order to secure their collective bargaining objectives. Of course, they remained free to engage in collective bargaining in an effort to compose their differences; but, once having undertaken to proceed to arbitration (in this case by specifically giving the “first round” arbitrator jurisdiction to require a second round) they could not now repudiate their previous commitment. They had created a new framework within which their bargaining had to be conducted and had given up certain bargaining tactics which might otherwise have been available to them. The Board found that the employer could not resile from that process and return to the previous collective bargaining *status quo*. Its attempt to do so constituted a breach of section 14 which, in the circumstances of this case, operated as a statutory fetter on the employer’s right to lock out its employees – a right which it would otherwise be entitled to exercise having properly terminated the collective agreement and completed the compulsory conciliation process.

10. The Board was satisfied that its interpretation of section 14, although novel, was neither inconsistent with the reasoning of the Court of Appeal, nor resulted in the creation of a perpetual process of arbitration. Indeed, the Board was doubtful whether section 14 could ever operate as a permanent bar to the right to strike/lock-out – unless, perhaps, the parties had, *ab initio*, explicitly and unequivocally, agreed to *forever* forego resort to economic conflict to resolve a bargaining impasse. Such agreement would be so unusual, and so inconsistent with the scheme of collective bargaining prescribed by the Act, that it would require the clearest possible language before the Board would be driven to consider this interpretation. In this respect the Board adopted the approach of Estey, J. in *Bradburn v. Wentworth Arms Hotel Ltd.*, [1978] S.C.R. 846 at 861.

11. At the reconsideration hearing the parties were permitted to call evidence on any and all matters which they considered relevant either to the Board’s earlier determination or to the new applications. In the unusual circumstances of this case the Board did not follow its usual practice on reconsideration applications of restricting new evidence to facts which could not have been obtained by reasonable diligence prior to the earlier hearing. It was apparent that the issues in all three applications were inextricably intertwined and of sufficient importance that both parties should have full opportunity to lead evidence and make their submissions with respect to all three. Accordingly, we heard such evidence as the parties wished to lead concerning the bargaining process and the parties’ conduct, both *before* and *after*, the original Board hearing; since, it will be recalled, the lock-out, and consequent economic loss, did not occur until after the earlier hearing. Furthermore, the union argued that our discretion to grant consent to prosecute might be influenced by what it characterized as the employer’s “flagrant disregard of the law” in proceeding to lock out its employees while the legality of that lock-out was before the Board.

12. The Board was impressed by the open and forthright manner in which all of the

witnesses gave their evidence; however, there is nothing in that evidence which substantially alters the factual basis upon which our earlier decision was based. Indeed, the evidence largely confirmed, or amplified, the agreed facts. The employer admitted that the lock-out was not provoked by, or a reaction to, any conduct of the trade union; rather, it was simply designed to force the employees to agree to the employer's terms. As both employer witnesses candidly admitted, many of the outstanding items had already been settled and the employer expected that its lock-out would *achieve a collective agreement*. We cannot accept the submission of counsel that the employer remained willing to proceed to arbitration despite its lock-out threat. The evidence is clear and uncontradicted that the employer was only prepared to proceed to the second round of arbitration if the union would forego any attempt to seek reimposition of the arbitration clause (i.e., a "third round" of arbitration.) The employer was concerned that the second round arbitration might issue an award requiring a third round and it was not prepared to risk this possibility. The evidence also indicates that the employer was well aware that its threatened lock-out was the subject of a proceeding before this Board, that the union had challenged the legality of its intended action, and that the Board would ultimately release a decision resolving the issue. In view of the statements made at the hearing the employer was, or ought to have been, aware of its potential financial liability. Nevertheless, on the advice of counsel, the employer decided to impose the lock-out as planned.

13. It might be noted that throughout the entire course of events the employer has been acting on the advice of its solicitors, who have apparently been intimately involved in both the tactical and legal considerations associated with the negotiations. The employer contends that in locking out its employees it was merely taking a "legal position" on the advice of counsel. It is argued that it was reasonable, in the circumstances, to rely on the advice of counsel and that, in taking this "legal position", based on the advice, it could not be said to have breached section 14 of the Act.

14. The employer is haunted by the spectre of perpetual arbitration – a series of successive rounds of arbitration, each "feeding" the next, and all arising from what the employer now considers to be its mistake in going to arbitration in the first instance. The employer views this possibility as the very antithesis of free collective bargaining and its concern is one that is legitimate and compelling – particularly having regard to the *obiter* statements of this Board in *Haldimand-Norfolk Regional Health Unit*, [1978] OLRB Rep. Feb. 197 which were favourably considered by Brooke, J.A. in the Court of Appeal. It is a position with which all members of this panel of the Board are sympathetic. However, the sincerity of the employer's concern does not, *ipso facto* justify its resort to a lock-out; nor does it turn the use of economic power, as a bargaining tactic, into an assertion of a "legal position." On the contrary, the lock-out of its employees was a form of affirmative action based upon certain legal premises and, as the employer was aware, the validity of those premises was being considered by this Board at the very time that the lock-out was being instituted.

15. Our holding that the employer is not entitled to lock out its employees does not mean that the employer is powerless to resist the reimposition of arbitration. It remains open to the employer to argue before the second round arbitrator that: he should not, as a matter of sound industrial relations judgment, attempt to provide for a "third round" of arbitration; or, alternatively, that a third round is inconsistent with the Court of Appeal's decision. The majority of the court (and in particular Arnup, J.A.) appears to base its decision,

as we have done, on the fact that the respondent agreed to two, and only two, rounds of arbitration. Only Brooke, J.A. posited an alternative legal theory which might support a continuation of arbitration. If the employer is unsuccessful in persuading the arbitrator not to continue the process into a third round, it is open to the employer to seek to quash the award to the extent that the arbitrator has exceeded his jurisdiction. All of these actions would involve the employer asserting, or protecting, its legal position, and there is nothing improper in any of them. What the employer was not entitled to do, however, was to lock-out its employees in an effort to avoid the second round of arbitration and force the employees to conclude a collective agreement. In our view this is entirely inconsistent with compliance with a procedure which the Court of Appeal found to be compulsory, and to which we are satisfied it had previously agreed.

16. On the basis of the evidence adduced before us, and for the reasons set out herein and, more particularly, set out in our earlier decision, we are satisfied that the employer breached section 14 of the Act when it engaged in a lock-out. In so finding we have carefully considered the employer's submissions that it was acting on the advice of counsel; but we do not consider that this can provide an effective defence in the circumstances. We wish to make it clear, however, that we express no opinion on the wisdom, legal validity or possible legal foundations for a clause prescribing a third round of arbitration should the second round arbitrator choose to prescribe one. We hold only: where an employer has voluntarily agreed to a two-round arbitration process, the Court of Appeal upholds the arbitrator's jurisdiction to prescribe a "compulsory" second round, and a second round is prescribed, the employer cannot resort to the economic pressure of a lock-out in order to avoid the second round. To do so would be to renege on its earlier commitment to resolve a collective bargaining dispute by arbitration and would be a breach of section 14. To the extent that it was necessary to comment on the scheme of the Act we have already done so in our earlier decision and it would serve no purpose to repeat that an analysis here.

17. We turn now to the question of remedy. The union seeks, by its section 79 application, to obtain compensation for the employees in respect of the wages which they lost when they were locked out. The union also seeks, on its own behalf, to obtain damages in respect of certain sums which, it argues, it was required to expend by reason of the lock-out. The statutory provision most relevant to this aspect of the case is section 79(4). The relevant portion of that section reads as follows:

"... where the Board is satisfied that an employer, employer's organization, trade union, council of trade unions, person or employee has acted contrary to this Act it shall determine what, if anything, the employer, employers' organization, trade union, council of trade unions, person or employees shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of,

- (a) an order directing the employer, employers' organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers' organization, trade

union, council of trade unions, employee or other person to rectify the act or acts complained of; or

- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers' organization, trade union, council of trade unions, employee or other person jointly or severally."

18. Prior to 1975 the Labour Relations Board had no jurisdiction to remedy alleged breaches of the duty to bargain in good faith; but this is not the first time that damages have been sought. In *The Journal Publishing Company of Ottawa*, [1977] OLRB Rep. June 309 the Board considered the appropriateness of a damage award where an employer, while engaged in a course of collective bargaining (which ultimately resulted in a timely lock-out), had contravened section 14 by prematurely breaking off negotiations, refusing to discuss certain issues in dispute and refusing to meet with certain designated representatives of the union. The Board found that during the protracted bargaining process there were a number of incidents which could be characterized as bad faith bargaining; however, the Board rejected the union's contention that there was any intention to eliminate the union altogether. A long and arduous bargaining process had merely been marked by certain incidents of bad faith bargaining by *both* parties. With respect to the union's request for damages, the Board commented:

"60. The ancillary request for damages also poses serious problems. The employer argued that the Board's general remedial power, found in section 79 of the Act, does not permit the awarding of damages, except in the limited circumstances where the Board is reinstating an employee under section 79(4)(c). The essence of the argument was that the power to award damages must be conferred upon the Board by a specific provision of the Act. We do not consider that the general remedial power is limited in such a way. The language of section 79 clearly provides the Board with the broadest power to provide relief where there has been a breach of the Act. The language of section 79(4)(c) is intended to clear up any doubts about the Board's power to reinstate employees, a remedy not available at common law, and not to restrict the awarding of damages to this one situation. The power of an arbitrator to award damages in the absence of express statutory authority has had long-standing approval from the Supreme Court of Canada. See: *Polymer Corp.* (1962), 33 D.L.R. (2d) 124. It would be strange indeed if the Labour Board did not have at least equal remedial authority, where the language of the legislation so clearly provides for it.

61. The existence of the power to award damages does not necessarily mean that such relief is appropriate. Although we do not agree with the employer's argument that damages are never an appropriate method of remedying a failure to bargain in good faith, we recognize that this type of remedy must be imposed with care. There are two concerns of partic-

ular importance. First, the awarding of damages should not result in the indirect imposition of a collective agreement. In this case, therefore, it would be inappropriate to award damages for loss of wages suffered as the result of the lock-out, since this approach would require the Board to determine terms and conditions of employment for those employees during that period. Second, the Board should not compensate for damage that results from the use of legal economic sanctions. The problem, in this case, is that the lost wages and employment benefits flow from the lock-out – an action that was timely, and not prohibited by the *Labour Relations Act*. The mere existence of an element of bad faith bargaining cannot convert an otherwise legal strike or lock-out into an illegal act, that would give rise to extensive liability in damages. The wrong lies with the manner in which the negotiations are conducted, not with the use of this economic sanction. To hold otherwise would introduce into the strike and lock-out an element of uncertainty that would disrupt the process of labour relations as it now exists in Ontario. In this case, although it is clear that the lock-out was not connected initially with any failure to bargain in good faith on the part of the employer, it could be argued that the employer's later failures to bargain in good faith subsequently tainted the lock-out. We do not accept this argument. The lock-out continued to be legal and damages, if any, must relate to extra negotiating costs that might have been caused by the employer's conduct, and not to the economic losses resulting from the lock-out itself.

62. In the circumstances of this case, however, we do not consider it appropriate to award damages for the extra negotiating costs that might have been incurred by the unions. This is a case where neither side can be given a clean bill of health, both sides on different occasions having failed to meet the standard of good faith bargaining. The responsibility for the breakdown of negotiations must be borne by both sides. Moreover, if these complaints had been brought to the Board more quickly, it is quite possible that the situation would have been corrected, and the damage would have been minimal. In this case, therefore, the Board does not consider it appropriate to award damages”

19. The *Ottawa Journal* case arose in the context of an unfettered bargaining situation in which neither of the parties had circumscribed its right to resort to economic sanctions as a means to resolve their collective bargaining dispute. Indeed, the employer's lock-out was imposed in response to a series of slow-downs called by the union. It was not the lock-out itself which constituted the bad faith bargaining – it was the incidents to which we have already referred. Likewise, it was not the sporadic strike activity which prompted the Board to find that the trade union had also failed to bargain in good faith. It was the union's refusal to discuss certain issues which the employer wished to raise. In neither case was the use of economic sanctions, in itself, an item of misconduct or a per se violation of section 14; and the Board was not prepared to find that the parties' other transgressions tainted an otherwise legal strike or lock-out.

20. The circumstances of this case are quite different. This is not a situation in which

the lock-out is “tainted” by extraneous incidents of bad faith bargaining. Here, it is the lock-out itself which constitutes the breach of section 14. By agreeing to a second round of arbitration (or, more precisely, clothing the “first round” arbitrator with jurisdiction to prescribe a “second round”) the employer had agreed not to resort to economic conflict – yet by locking out its employees it did just that. We simply do not think the concerns expressed in the *Ottawa Journal* are applicable on the facts presently before us. It cannot be said that in the circumstances here present the potential liability in damages would “introduce into the strike and lock-out an element of uncertainty that would disrupt the process of labour relations as it now exists in Ontario.” Not only is the situation in this case unique, but it can hardly come as a surprise to the employer that it was risking financial liability if it failed to comply with a process which the Court of Appeal had described as “compulsory.” The propriety of the lock-out was being considered by this Board at the time that the employer locked out its employees and the Board had specifically drawn the employer’s attention to the possibility of damages in the event that the Board found that it was not entitled to do so. Lost wages arising from a lock-out are not only “reasonably foreseeable” in a legal sense; they were specifically adverted to by the Board prior to the lock-out’s commencement. Our decision does not introduce a note of uncertainty; it merely confirms that a party will be required to adhere to its commitments.

21. There is no problem in this case in quantifying the employee’s losses. Had there been no lock-out, the employees would have continued to earn wages at their then prevailing wage rates, and the new agreement would have been settled by the arbitration process. *Prima facie*, the measure of damages suffered by the employees is the value of the wages lost by reason of the lock-out.

22. We further note that the lock-out was not a response to any provocative union conduct nor is there any evidence before us, as there was before the panel in the *Ottawa Journal* case, which indicates that the union has bargained in bad faith. This is not a case in which a party seeking relief has itself been guilty of misconduct. Finally, in contrast to the situation in the *Ottawa Journal*, the union did not delay in seeking relief from this Board but moved to clarify its rights at a time when no financial losses had been incurred. In the circumstances we are satisfied that the employees are entitled to be compensated for all the wages and benefits lost while they were locked out.

23. One of the employees, Patricia Totton, had taken one week holiday prior to the lock-out and was scheduled to be on holiday for the first two weeks of the lock-out. When the lock-out was implemented she reported to work, verified that a lock-out was in progress, and thereafter spent the two weeks, when she would otherwise have been on holiday, working in the union office and engaging in picketing and other related activities. While the Board can understand why an employee might choose to forego her planned cottage holiday so that she could participate in union activities, we do not think that she thereby becomes entitled to two further weeks off. She was paid her holiday pay and could well have taken her vacation despite the lock-out. It was her own choice not to do so. The loss of vacation time did not result from the lock-out and, accordingly, the employer is not required to grant further time off.

24. In addition to the damage claim made on behalf of the lock-out employees, the trade union seeks compensation on its own behalf in respect of certain expenses which it claims were necessarily incurred as a result of the employer’s lock-out. The union maintains

that it was required to engage counsel to make two applications to this Board and, further, that as a result of the lock-out, it was required to expend certain funds in order to focus attention on the employer's conduct, mobilize public support for the trade union and make it clear that the trade union was not responsible for the work stoppage. The union tendered bills in respect of rental payments for a "lock-out headquarters", radio and newspaper advertising, long distance telephone calls and certain printed material. All of these expenses were associated with the union's public campaign. The amounts claimed are not unreasonable. The union argued that the Board should fashion a "make whole order" which included compensation to the union for all expenses incurred.

25. The power to fashion broad compensatory relief, in the nature of a "make whole" order, is expressly authorized by section 79(4) of the Act, and is now firmly established in the Board's jurisprudence. Such make whole orders, in appropriate circumstances, have included a trade union's organization costs or extraordinary organizing costs, wasted negotiation costs and necessarily incurred legal costs caused by the commission of the unfair labour practice. In *The Academy of Medicine*, [1977] OLRB Rep. Dec. 783, for example, an employer threatened to close, and eventually did close, the part of its business operation in which a group of employees was seeking to organize. This shut-down, putting a number of employees out of their jobs, was designed to thwart the trade union's organizing campaign and frustrate the possibility of union organization in other aspects of its business. In awarding the union "all reasonable organizational, bargaining and legal and other expenditures" the Board noted:

"48. The Board, having regard to the seriousness of the respondent's unfair practices, to the impracticality of making orders for rectification, and to the fact that the employer is continuing in operation other aspects of its enterprise, has concluded that this case is an appropriate one for the granting of a "make whole" order. The Board orders the respondent to reimburse the union for all reasonable organizational, bargaining, legal and other expenses associated with its efforts to acquire and pursue its statutory rights. Such expenses are to include the costs of proceedings before the Board, proceedings which would not have been necessary but for the unfair labour practices of the respondent. While this part of our order is equivalent to an award of costs, it should not be taken as signalling a retreat from the Board's general practice of not awarding costs as against an unsuccessful party. This is a case, however, where the employer's contraventions of the Act are so serious that the resulting legal costs to the union cannot be ignored. Moreover, the rationale underlying the Board's practice of not awarding costs – that of not identifying a "winner" and a "loser" – is of no application where, as here, the conduct of the employer has made it impossible for the parties to live together in the future. (See *Repac Construction and Material Limited*, [1976] OLRB Rep. Oct. 610.) It should be stated, however, that the board has not attempted in this decision to exercise any general procedural power to award costs. What the Board has done is exercise its remedial authority under section 79 (4)(c) of the Act so as to, as nearly as possible, restore the union to the position it was in prior to the respondent's unfair practices. Given the impracticality of an order for rectification, full compensation, including all reasonable legal expenses, ought to be awarded to the union."

Similarly, in *Radio Shack*, [1979] OLRB Rep. Dec. 1126 the Board found that an employer's egregious unfair labour practices, and flagrantly illegal attempts to undermine a trade union, justified an exceptionally broad remedial order, which included compensation in respect of the trade union's negotiating costs and extraordinary organizing costs. In that case, however, the Board did not award the complaint's legal costs. The Board commented:

"The Board is hesitant to pursue this line of compensation because of the possibility that the denial of legal costs to those parties who successfully defend against complaints, may be misunderstood and perceived as unfair. This policy may be reviewed by the Board from time to time."

Thus, it is apparent that, since *Academy of Medicine*, the Board has developed a concern about awarding legal costs as a general rule. In the facts at hand, we think the *Radio Shack* approach to costs should be followed.

27. Because of the nature of the employer's unfair practice in this case, and the rather unique circumstances in which it arose, the kind of damages claimed by the union are rather different from those sought in either *Radio Shack* or *Academy of Medicine*. The union's expenditures are also somewhat different from those usually incurred by a trade union in a strike/lock-out situation where each party seeks to mobilize economic pressure against the other. Here they are more related to the union's desire to maintain a favourable image than an attempt to keep the unit together in face of employer unfair practices. The trade union's expenditures are not, as in *Academy of Medicine* or *Radio Shack*, "organization" expenses or costs directly related to the preservation of the trade union's status as the employees' exclusive bargaining agent; nor were they costs incurred needlessly while pursuing fruitless negotiations. No doubt the union felt compelled to engage in an advertising campaign in order to explain to the public that it was not responsible for the work stoppage, but these public relations expenditures were intended primarily to protect, and enhance, the union's reputation in the local community. From the "lock-out headquarters" the union members continued to provide certain limited services to the public and conducted a publicity campaign to explain the importance to the community of the public health nurse. Some of the literature used had nothing directly to do with this particular dispute, and some was designed to mobilize public support for interest arbitration of all disputes. In this respect the advertising campaign, although triggered by the lock-out, represents a continuation of the union's ongoing campaign in support of its position that arbitration is the preferable way to resolve disputes in the public health sector. In our view the expenditures claimed do not arise so necessarily and directly from the employer's breach that in order to effectuate the policies of the Act it is necessary to grant compensation. While we can appreciate the employees' motivation, we do not think the particular expenses claimed were necessarily incurred to mitigate the damages arising from the employer's lock-out. They are simply too remote. As we have already mentioned, the circumstances of this case are significantly different from those in the *Academy of Medicine* where, it will be recalled, the Board ordered the payment of legal expenses (*inter alia*) because there were no other effective remedies. Here, our compensation award and section 14 finding should effectively remedy the situation. We might also observe that the employer's legal position was not a frivolous one, nor were its arguments without considerable force. The legal issues raised by this application are both novel and complex. Indeed, despite the conclusion which we ultimately reached, the success with respect to the various legal arguments made by the parties, was divided.

28. There remains the union application to prosecute the employer for its violation of section 14. We are satisfied that the remedies, by way of declaration and compensation to the employees, can adequately remedy the employer's breach and we do not think that a criminal prosecution is consistent with the promotion of good industrial relations between the parties. While the employer might have been wiser to await the Board's decision before locking out its employees (thereby avoiding the necessity to pay compensation) we do not, in the circumstances of this case, see any public, or private, purpose which would be served by a criminal prosecution of the employer and the possible payment of a fine from a local board of health to the Crown.

29. For the reasons given, the Board:

- (a) declines to reconsider, or amend, its earlier finding that the respondent employer contravened section 14 of *The Labour Relations Act*;
- (b) orders compensation to the employees improperly locked out in respect of all wages and benefits lost;
- (c) denies the union's request for damages on its own behalf, and
- (d) dismisses the union's application for consent to institute prosecution.

For purpose of clarity the Board notes that the compensation payable to employees shall bear interest calculated in the manner set out in *Hallowed House Ltd.* (Board File No. 0905-79-R, decision dated January 21, 1980 – as yet unreported).

30. The Board will remain seized in order to deal with any problems in calculating the monies owing to the employees.

DECISION OF BOARD MEMBER R. W. REDFORD:

1. The majority of the Board have found that the Grey-Owen Sound Health Unit are liable for payment of all wages and benefits lost while the employees were locked out. The instruction specifically excludes compensation for lost vacation for Patricia Totton and specifically rejects claims for damages arising from certain expenses claimed to have been incurred as a result of the employees lock-out and legal expenses.

2. I note that the majority at paragraph 27 indicate that "the employer's legal position was not a frivolous one, nor were its arguments without considerable force". In my view, the force of the employer's arguments was sufficient to be persuasive. I have outlined my views in a dissent from the original hearing issued in August 1979. Since I believe the lock-out to have been permissible and conducted according to the prescription of the Act, I would not have required the payment of damages for wages and benefits lost during the lock-out. No new evidence was brought out during the re-hearing that would have changed this view.

1654-79-R Reta Arlene Behm Bonnie Lee Stanistreet, Applicants, v. Canadian Union of Public Employees Local 2103, Respondent, v. **336496** Ontario Limited (operating Grove Park Lodge), Intervener.

Bargaining Rights – Termination – Timeliness – Statement of desire from employees requesting representation vote – Board considering findings in prior applications where management involvement found – Meeting on employer’s premises – Application dismissed

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Jacques A. Emond, Reta Arlene Behm and Bonnie Lee Stanistreet for the applicants; Mario Hikl and Jim Woodward for the respondent; P. B. Kane for the intervener.*

DECISION OF THE BOARD; February 6, 1980

1. The name of the respondent is amended to read: “Canadian Union of Public Employees Local 2103”.

2. This is an application for a declaration, pursuant to section 2(2) and 9(2) of *The Hospital Labour Disputes Arbitration Act* and sections 49(2)(a) and 49(3) of *The Labour Relations Act*, terminating the bargaining rights of the respondent trade union, Canadian Union of Public Employees Local 2103.

3. The application was filed with the Board on October 19, 1979, and re-filed on November 1, 1979. The respondent takes the position that the application is untimely.

4. The relevant statutory provisions are set out below. Section 2(2) and 9(2) of *The Hospital Labour Disputes Arbitration Act* read as follows:

“2.-(2) Except as modified by this Act, *The Labour Relations Act* applies to any hospital employees to whom this Act applies, to the trade unions and councils of trade unions that act or purport to act for or on behalf of any such employees, and to the employers of such employees.

9.-(2) Notwithstanding section 53 of *The Labour Relations Act*, where notice has been given under section 45 of that Act by or to a trade union that is the bargaining agent for a bargaining unit of employees of a hospital to or by the employer of such employees and the Minister has appointed a conciliation officer, an application for certification of a bargaining agent of any of the employees of the hospital in the bargaining unit defined in the collective agreement or an application for a declaration that the trade union that was a party to the collective agreement no longer represents the employees in the bargaining unit defined in the agreement shall not be made after the day upon which the agreement ceased to operate or the day upon which the Minister appointed a conciliation officer, whichever is later, except in accordance with section 5 or subsection 2 of section 49 of *The Labour Relations Act*, as the case may be.”

Section 49(2)(a) and 49(3) of *The Labour Relations Act* read:

“49.-(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 53, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation.

(3) Upon an application under subsection 1 or 2, the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause *j* of subsection 2 of section 92 that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.”

Section 53 of *The Labour Relations Act* adds nothing to the case at hand. The sole issue at present is whether or not a conciliation officer had been appointed, as of the date of the application. The respondent concedes that no such appointment had been made, but relies in its submission on the following chronology of events.

5. The previous collective agreement expired on July 1, 1979. That collective agreement was a product of arbitration under *The Hospital Labour Disputes Arbitration Act*. Mr. Hikl, on behalf of the respondent, explained to the Board that there was some problem relating to the expiry date of that agreement so, to be on the safe side, the union applied for conciliation on June 20, 1979. Based on certain objections by the employer, the Minister of Labour then referred the respondent's application to the Ontario Labour Relations Board for a determination pursuant to section 96 of the Act as to whether the Minister had the authority to make the appointment. In the meantime, certain of the employees at Grove Park Lodge filed an application for a declaration terminating the bargaining rights of the respondent (not the present application). Mr. Hikl neglected to advise the Board that the respondent and the employer together agreed to defer the Board's dealing with the section 96 reference until the Board had made its determination on the application for termination. The latter decision was released by the Board on September 24, 1979, dismissing the application for termination (Board File No. 0346-79-R). The hearing for the section 96 reference was scheduled for September but was again adjourned, on the agreement of the parties, on the basis that the employer had just retained new counsel. The actual hearing of the section 96 reference took place on October 25, 1979. In the meantime, as noted above, certain employees filed another application for a declaration terminating bargaining rights, being the present application. The Board's decision on the section 96 reference was issued on November 15, 1979, and the Minister moved expeditiously to appoint a conciliation officer within a few days subsequent to that (Board File No. 0740-79-M).

6. The respondent in its submission relies particularly on paragraph 11 of the Board's November 15th decision, which stated:

An alternative argument counsel for the respondent contended that if the Board confirmed the Minister's authority to appoint a conciliation officer it should recommend that the Minister delay the appointment until the termination application is disposed of. In view of the mandatory nature of section 15(1) and for the reasons set out above relating to the prejudice occasioned by delay, the Board is of the view that an appointment made under section 15(1) is an appointment that, in the absence of an agreement of the parties to the contrary, should be made forthwith.

On the basis of this passage, the respondent argues that the Minister ought to have made the appointment of the conciliation officer retroactive to some earlier date, and that this Board ought therefore to treat the appointment as having been so made.

7. It would appear, however, that the respondent has misread the quoted passage from the Board's November 15th decision. The termination application being referred to at that point in time was the present application (the other application having been disposed of), and immediately following release of the Board's decision under section 96, the Minister did, in fact, move forthwith to appoint a conciliation officer. Any delays up to that point in time were in fact, as the Board contemplated in the second sentence of para. 11, the product of the agreement of the parties, including the respondent. In any event, it is highly questionable, at best, whether the Minister could ever make the appointment of a conciliation officer "retroactive", and there is no question at all that this Board lacks the jurisdiction to "deem" such to have been the case. The Legislature has set out in express terms the extent of the "open period" during which an application for a declaration terminating bargaining rights, *inter alia*, may be brought, and the lack of appointment of a conciliation officer is clearly more than a "technical irregularity" falling within the Board's remedial powers under section 103 of the Act. The present application, therefore, is timely.

8. The Board received in conjunction with this application a statement of desire signed by 23 of the 25 employees in the bargaining unit. That statement does not specifically state that the signatory employees no longer wish to be represented by the respondent trade union. Rather, the statement on its face simply calls for a representation vote to be taken. There is no direct provision in the Act for such a request. However, having regard to the fact that the respondent trade union already *has* bargaining rights, the Board is prepared to treat the employees' request as a statement that the employees no longer wish to be represented by the respondent trade union. If found to be voluntary, therefore, the Board would take the statement as signifying that not less than 45 per cent of the employees in the bargaining unit no longer wish to be represented by the trade union, and would direct that a representation vote be taken.

9. Before proceeding further, it is necessary to review the decision of the Board dated September 24, 1979, in which the previous application for a declaration terminating bargaining rights was dismissed. None of the parties in the present application took the position that the Board is prevented from considering the findings of fact set out in the Board's prior decision. The only argument put forward was that those facts must be read as applying only to the time at which they occurred.

10. In its prior decision, the Board found that the dominant role in the application clearly was played by Mrs. Rosemary LaForme. The Board noted that an even earlier appli-

cation for decertification had been dismissed on the basis that the owner of the Lodge himself, Mr. Viveen, had been instrumental in the origination and circulation of the statement of desire. The Board had to consider whether there was any carry-over effect which would similarly taint the second application. One of the things the Board expressed concern over was the fact that the statement of desire before it had at one point been left unattended on the counter of the medication room. That problem does not arise in the present application. Clearly, however, the major concern to the Board was the role of Mrs. LaForme and her relationship to the Viveens, coupled with certain threats attributed to Mr. Viveen. In paragraph 7 of its decision the Board found as follows:

"... On April 24, 1979 an employee was approached to sign the petition during her working hours. As well, shortly after she signed the petition, LaForme told her that it was a good thing she had signed because if she hadn't the full-time employees would be fired. At a meeting of non-union supporters on May 7th, LaForme, the primary spokesman at the meeting, told the gathering that she knew Mr. Viveen and his ways and that if they didn't go along with him he would make it hard on them and make them want to quit their jobs. As well, the Board accepts the evidence that Mr. Viveen was deeply involved in all aspects of a termination application and attendant petition which was circulated approximately a year before the instant petition. It was admitted by LaForme that she helped circulate the first petition. The Board further accepts the evidence that Viveen suggested LaForme's name to the prime mover of the first petition as someone who would be willing to help."

Also in paragraph 10 of its decision, the Board found as follows:

"There was uncontradicted evidence from a number of witnesses that LaForme spent a great deal of time in the Viveens' office and that she was particularly friendly with them. The Board accepts that LaForme's duties as the nurse in charge of the afternoon shift would necessitate frequent discussions of a business nature with the Viveen's. The Board draws from all the evidence, however, that LaForme was reasonably perceived by employees as having a relationship with the Viveens that extended beyond that which usually exists between the ordinary employer and employee. ..."

11. Finally, while not normally a problem, in light of the special circumstances existing at the Lodge the Board in its September 24th decision expressed concern over the fact that the petition was signed on the premises of the Lodge itself.

12. We turn now to the present application. This application was filed by Mrs. Reta Behm and Mrs. Bonnie Stanistreet. Both are Nurses Aides and members of the bargaining unit. Mr. Behm is a close friend of Mrs. LaForme. She assisted Mrs. LaForme in the prior application, and attended with her at the hearing of that application. Mrs. Behm testified that when Mrs. LaForme received the Board's decision in the earlier application, she asked Mrs. Behm to get together a meeting of the other employees. Mrs. Behm testified that she herself had been receiving numerous inquiries from the other employees who had been awaiting the results of the Labour Board hearing. Mrs. Behm testified that she and Mrs. LaForme discussed the place for a meeting, and they decided upon the Lodge itself as being

central in a largely rural community. Mrs. Behm believes it was her own idea to use the Craftsroom, which is a recreational lounge area used both by residents during the daytime and by employees in their off hours. It has been used in the past for employee functions such as baby showers, and Mrs. Behm was not aware of any employee having had to ask permission for such use. The meeting was set for 7:00 p.m. September 30th, two days after Mrs. LaForme received the Board's September 24th decision. There were four employees on duty on the evening shift that night, and Mrs. Behm explained that they attended the meeting on their break. Mrs. Behm did not know whether the Viveens were in the Lodge that night or not. The meeting lasted for some two and one-half to three hours. Mrs. LaForme began by reading the Board's decision out to everyone. She then said words to the effect that she had done all she could, and it was up to the employees to do what they wanted from there on. When asked whether they could start over with a new application, Mrs. LaForme replied that they could if they wanted to, but that she would not get involved herself. Mrs. LaForme then passed the Board's decision around the room for everyone to read. It was decided to write to the Labour Board, and Mrs. Behm took down the comments of the various people at the meeting. She wrote them up in a letter, which she then read back to the meeting. She prepared a heading for the list of employee signatures to go with the letter, and stated that anyone who wanted to sign could sign. All 23 of the employees present signed the list. Mrs. LaForme was present throughout the discussion and participated in it to the same extent as the other employees, although Mrs. Behm could not remember any specific comment by Mrs. LaForme. Mrs. LaForme was the thirteenth person to sign the list. Mrs. Behm then made copies of the letter and the list in town and sent the originals to the Labour Board.

13. Mrs. Stanistreet also testified in support of the application. Her evidence essentially confirmed Mrs. Behm's account of the September 30th meeting, although Mrs. Stanistreet was more positive in her recollection that Mrs. LaForme contributed nothing to the discussion following her opening remarks. Like Mrs. Behm, Mrs. Stanistreet could not say whether the Viveens were at the Lodge that evening.

14. One collateral aspect of Mrs. Behm's evidence should be commented upon. Mrs. Behm got the clear impression, from a comment made to her on the street by one of the employees supporting the union, that the union had received notification of the Board's September 24th decision several days in advance of Mrs. LaForme. The Board makes every effort to ensure that notification of its decisions goes to all parties at the same time. Owing to administrative oversight, however, gaps in the notification process, on occasion, do occur. If such occurred in the case under discussion, the Board expresses its apology.

15. Mrs. Delarge, the President of the Local, gave evidence on behalf of the respondent trade union. However, she did not demonstrate sufficient first-hand knowledge to contradict the evidence of Mrs. Behm that no permission was required for employees to use the Craftsroom at the Lodge. Nor was Mrs. Delarge's account of the incident of December 19th, wherein Mrs. Behm suggested to Billy Viveen, son of the owners, that she would have to take over in Mrs. Viveen's absence, sufficient to establish that Mrs. Behm exercised management responsibilities, or was perceived in that way. The evidence was equally consistent with Mrs. Behm's explanation of this as being a standing joke amongst the employees at the Lodge. The Board also accepts Mrs. Behm's explanation that it is part of her duties as a Nurse's Aide to initially oversee new or returning staff members. The Board therefore has no reason to doubt any of the evidence presented to it by either Mrs. Behm or Mrs. Stanistreet.

16. The presence of Mrs. LaForme throughout the origination and circulation of the statement of desire raises a real problem, however. The Board has always been sensitive to the particular vulnerability of employees arising out of the employer-employee relationship. As stated in the *Pigott Motors (1961) Ltd.* case, 63 CLLC ¶16,264:

“There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of those facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously vulnerable to influence, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a nature which will provide some reasonable assurance that a document such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories.”

and in the *Peel Block Co. Ltd.* case, 63 CLLC ¶16,227:

“... It is a function and duty of this Board to be vigilant and scrupulous in its concern to protect the fundamental rights of employees to make their own choice, as distinct from the choice of their employer, on the matter of selecting or rejecting a bargaining agent.”

See also *CCH Canadian Limited*, [1975] OLRB Rep. Jan. 19, which involved an application for termination of bargaining rights.

17. The Board has before it, in the present case, a cogently-worded statement of desire signed by almost the full complement of the bargaining unit. The Board must still be satisfied, however, that the motivation behind such a statement was of a truly voluntary nature; that is, as the above cases indicate, that the employees are not simply identifying themselves with the choice of their employer, out of fear of antagonizing their employer, or fear of reprisal, or for whatever reason. This is a fundamental duty which the Board owes to the employees themselves, and is made a pre-condition under section 49(3) of *The Labour Relations Act* to its power to direct the holding of a representation vote.

18. As the *Pigott Motors* case, *supra*, makes clear, so vulnerable are employees to employer influence that the influence need not even be created by employer design. The Board in a long line of cases has refused to accept as voluntary a statement of opposition to a trade union signed in circumstances where the employees could reasonably believe that their failure to sign would come to the attention of management. In the *Morgan Adhesives of Canada Limited* case, [1975] OLRB Rep. Nov. 813, for example, the Board stated at paragraphs 30 and 31:

“30. The finding of the Board is not intended to imply collusion or other conscious or deliberate improprieties on the part of either the objectors and/or the respondent company. There is no evidence before the Board which would support such a finding.

31. ... The evidence taken as a whole however, supports the inference that the employees of the respondent company would logically have assumed that management supported the petition, albeit in a tacit manner and that the names of those refusing to sign the petition would become known to management.”

19. In carrying out its statutory duty, the Board is at the same time conscious that it must not be overprotective of employees' interests to the point where its evidentiary requirements become an unwitting trap for those very employees trying to express themselves. At all times a balance must be struck. There was, however, nothing ambiguous in the findings of the Board with respect to Mrs. LaForme on the previous application. The Board concluded that Mrs. LaForme was “reasonably perceived” by the employees as having a special relationship with the owners, and, as noted in the *Morgan Adhesives* case, *supra*, it is the perception of the employees that is critical in assessing the voluntariness of their actions. See also *Dad's Cookies Ltd.*, [1976] OLRB Rep. Sept. 545 especially paragraph 18; *Leamington Vegetable Grower's Co-operative Limited*, [1974] OLRB Rep. June 402; *Link Manufacturing Ltd.* (unreported), Board File No. 48682-53-R In addition, it was Mrs. LaForme herself, in April and May of 1979, who communicated to the other employees the likely consequences of failure to oppose the union. Particularly in the absence of any intervening circumstance, such as a collective agreement, to indicate to employees a change in management's attitude, it cannot be assumed that the effect of those statements, made some five or six months previously, would be spent. Having regard, therefore, to all of the Board's comments in the earlier decision, it is impossible to be satisfied now that the employees at the September 30th meeting, attended by Mrs. LaForme, would have no concern that their views would subsequently become known to management, and perhaps result in reprisals.

20. It would have been perfectly reasonable for Mrs. LaForme to have called a meeting, as she did, to advise the other employees of the results of the prior termination application, and then to have left when the discussion turned (as it did almost at once) to a fresh termination application. *But she stayed*. In the circumstances, her right to be present as a member of the bargaining unit was overridden by the Board's comments about her, as set out in the very decision which she had just read aloud. That should have been evident from a fair reading of the Board's decision (whether or not particular individuals may have agreed with that decision).

21. As the Board stated in dealing with a not dissimilar problem in the case of *Hoffman Concrete Products Limited*, [1976] OLRB Rep. Feb. 35, at paragraph 8:

“The evidence that Kevin Hoffman signed the petition is not in itself sufficient to cast doubt on the petition even assuming him to be a regular employee like everyone else. The misfortune is that at the planning stage of adopting strategy to frustrate the applicant's organizational campaign, employees in attendance at the meeting appreciated the conflict that might ensue to their prejudice. Mr. Hoffman ought to have either offered to disqual-

ify himself from the meeting or he should have been invited to leave. Instead he participated in the meeting where the origination of the petition was spawned. . . .”

22. Similarly, Mrs. LaForme’s presence has made it impossible for the Board to be satisfied that the statement of desire before it represents a voluntary expression of the wishes of the employees. The Board has no alternative but to dismiss the application.

0186-79-R Christian Labour Association of Canada, Applicant, v. **Master Insulation Company Limited**, Respondent, v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Intervener.

Certification – Construction Industry – Whether participation by employer in activities of applicant trade union – Representation vote ordered.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members O. Hodges and R. W. Redford.

APPEARANCES: *Elizabeth J. Forster and Ed Vanderkloet for the applicant; W. G. Posthumus, H. P. Schuetze and J. Bittenbinder for the respondent; B. Fishbein and J. Duffy for the intervener.*

DECISION OF THE BOARD; February 1, 1980

1. The applicant has applied for certification with respect to a bargaining unit of insulation mechanics and insulation apprentices employed by the respondent in the province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. The Board further finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*.
4. The intervener has bargaining rights for the employees who are affected by this application by virtue of a collective agreement between the intervener and The Master Insulators’ Association of Ontario, Incorporated, effective from July 7, 1975, until April 30, 1979 (the “collective agreement”). This application was filed on April 27, 1979, and is therefore a timely application. Due to a stated case which was made to the Divisional Court in a companion case (see Board File No. 1882-78-M) the first day of the hearing in the instant application was not held until October of 1979.
5. The intervener in its amended intervention opposed this application on the following grounds:

“The Respondent either participated in the formation, administration and selection of the Applicant or contributed support to the Applicant with respect to the subject application for certification, contrary to Section 12 of the Act, the particulars of which are as follows:

(i) The employees who are the subject of this application were hired contrary to Article 2 of the Collective Agreement binding on the Respondent on the date of application and, in particular, Article 2.01 which provides:

“2.01 The employers shall employ as employees members of the Union in good standing in performance of all work coming within the scope of this Agreement and shall continue in their employ only employees who are in good standing with the Union. All such employees shall be hired through the Union office ...”.

(ii) The said employees were former employees of Frigid Insulation Limited, a company for which the Applicant was certified as bargaining agent by the Board for Board Areas 8 and 12 in decisions dated August 17th, 1977 (O.L.R.B. File No.: 0754-77-R) and December 9th, 1977 (O.L.R.B. File No.: 1370-77-R) respectively and consequently were known by the Respondent to be supporters or former members of the Applicant.

(iii) The presence of the said employees led to the filing of a grievance by the Intervener upon the Respondent on February 12th, 1979, which was referred to arbitration pursuant to Section 112a of the Act on February 15th, 1979, (O.L.R.B. File No.: 1882-78-M). However, at the hearing of the grievance on March 2nd, 1979, Mr. Josef Bittenbinder, an officer of the Respondent, called by the Intervener as a witness to establish the grievance, refused to take the stand and be sworn, although properly summonsed and directed by the Board to do so. By decisions dated March 7th, 1979 and March 22nd, 1979, the Board found itself unable to proceed and the referral of grievance to arbitration was adjourned to allow the Intervener to pursue its remedies to compel Josef Bittenbinder to testify. Such proceedings have been instituted by the Intervener and are currently pending before the Divisional Court.”

6. Based upon these allegations the intervener alleged as follows:

“Consequently, the Respondent either,

(a) knew, or ought to have known that the subject employees were supporters or former members of the Applicant and hired them in a deliberate attempt to support the subject Application for Certification and thereby defeat the bargaining rights of the Intervener;

(b) in the alternative, upon hiring its employees, contacted the Applicant and advised the Applicant to organize its employees in an effort to defeat the bargaining rights of the Intervener.”

7. The intervener subpoenaed two former employees of the respondent, George Radocaj and Arnoldo Pividor, together with the president of the respondent, Joseph Bittenbinder, and the secretary-treasurer of the respondent, Helmut Schuetze. It was clearly the thrust of the intervener's position that Messrs. Radocaj and Pividor were the two employees who were referred to by the applicant in paragraphs five and six. The evidence before the Board, however, established that Messrs. Radocaj and Pividor were not employed by the respondent on April 27, 1979, the date of the filing of this application. In fact Mr. Radocaj and Mr. Pividor last worked for the respondent in March of 1979.

8. The evidence of Helmut Schuetze established that on April 27, 1979, the respondent had in its employ two insulators, Gary Elliott and David Penn. The evidence further established that Mr. Elliott commenced working for the respondent on April 24, 1979, and that his employment with the respondent was terminated on April 30, 1979. Mr. Penn commenced working for the respondent on April 25, 1979, and his employment with the respondent was terminated on June 8, 1979.

9. The intervener argued that Messrs. Elliott and Penn were unlawfully employed by the respondent in contravention of Article 2.01 of the collective agreement. The intervener alleged that the respondent had hired Messrs. Elliott and Penn who were former employees of Frigid Insulation Limited and Messrs. Radocaj and Pividor were known by the respondent to have been members of the applicant. The intervener strenuously argued that the respondent had stalled and derailed a grievance in Board File No. 1882-78-M and that but for that grievance this application might never have taken place. The intervener pointed out that ultimately the grievance in Board File No. 1882-78-M was settled in its favour in that the Board had endorsed the record with a declaration that the respondent had violated the collective agreement. The intervener also pointed out that in Board File No. 1882-78-M the Board had further endorsed the record by directing the respondent to pay four thousand dollars to the intervener.

10. The intervener also argued that two rather than one employee were hired briefly by the respondent during the open period provided for in section 5 of the Act and that neither had been hired through the intervener. The intervener referred to the hiring of Messrs. Elliott and Penn and characterized it as a series of coincidences. The intervener also referred to and questioned the telephone call from a Mr. Adema of the applicant to the respondent during the end of April of 1979. In the intervener's view the entire certification proceeding had been circumvented by the manoeuvring of the respondent. The intervener asked the Board to draw an inference that in all the circumstances and coincidences there had been support by an employer for the applicant. The intervener urged the Board not to certify the applicant because of the respondent's conduct under section 12 of the Act.

11. There is no evidence before the Board which establishes that either Mr. Elliott or Mr. Penn previously worked for Frigid Insulation Limited. While Mr. Radocaj and Mr. Pividor worked for Frigid Insulation Limited before they worked for the respondent, they are not employees who are affected by this application. It was the uncontradicted evidence of Mr. Schuetze that Mr. Elliott came to the respondent's door and asked for a job. The respondent had a job in a school in Scarborough and hired him. It is also the uncontradicted evidence of Mr. Schuetze that Mr. Elliott then asked for a job for his friend Mr. Penn and that the respondent hired Mr. Penn. The intervener has not challenged Mr. Schuetze's evidence that he did not know either Mr. Elliott or Mr. Penn when the respondent hired them.

12. The intervener endeavoured to make a connection between the alleged employment of Messrs. Radocaj and Pividor on April 27, 1979, and two earlier certificates which had been issued to the applicant with respect to Frigid Insulation Limited on August 17 and December 9, 1977 (see Board Files No. 0754-77-R and 1370-77-R – unreported decisions). However, the evidence establishes that Messrs. Radocaj and Pividor were not employed by the respondent on April 27, 1979. In addition, it was the unchallenged evidence of Mr. Bittenbinder that he had ceased to have any involvement in Frigid Insulation Limited prior to the making of the applications and the issuance of these two certificates in Board Files No. 0754-77-R and 1370-77-R.

13. While it is true that certain relief was granted to the intervener in Board File No. 1882-78-M, the violations of the collective agreement by the respondent do not in themselves affect the rights of either the respondent's employees or the applicant. Mr. Bittenbinder's conduct in Board File No. 1882-78-M led to the Board stating a case to the Divisional Court. While the Divisional Court made no order as to costs, the application was dismissed. The Divisional Court and the Board recognized the validity of the complaints made by Mr. Bittenbinder about the all-encompassing nature of the description of documents in the summons and the danger of him and his company being submitted to a fishing expedition. The Divisional Court also stated that in the light of the Board's approach to the proceeding in Board File No. 1882-78-M it could only assume that Mr. Bittenbinder's objections were raised for the purpose of delay. However, in the absence of a collusive arrangement between the respondent and the applicant, the Board finds no reason to deny certification to the applicant.

14. The intervener argued that a telephone call between a Mr. Adema of the applicant and the respondent was evidence of support by the respondent. The evidence with respect to this incident establishes that towards the end of April of 1979 one of the respondent's employees told Mr. Schuetze about the applicant after Mr. Adema had telephoned Mr. Schuetze and confirmed where Messrs. Elliott and Penn were working. It was the uncontradicted evidence of Mr. Schuetze that he did not contact the applicant. In addition, there is no indication that this telephone call was made before Messrs. Elliott and Penn became members of the applicant. Mr. Adema's telephone call is consistent, for example, with a check on the location of the work so that the Board may be advised whether the Board's Form 52, Notice to Employees of Application for Certification, Construction Industry, has been posted.

15. Finally, the intervener argued that the hiring of two employees by the respondent, the minimum needed for certification, for a brief period of time, was just too much of a coincidence. The pattern of hiring in the construction industry, both with respect to numbers and duration is usually unlike the situation with respect to industrial or commercial undertakings. In the construction industry the employment of a work force of two employees for a brief duration is not at all uncommon. Employees are hired according to the size and duration of the work which their employer has been able to obtain. The Board is not prepared to find on the evidence before it that there was anything untoward in the employment of Messrs. Elliott and Penn by the respondent.

16. The intervener asks the Board to make certain inferences in the light of all the coincidences or circumstances of this application. The Board is of the opinion that inferences may be made in this application. However, the inferences to be drawn in this application on

the balance of probabilities do not support the allegations of the intervener with respect to section 12. The intervener's allegations with respect to section 12 were based upon incorrect information. The respondent came prepared to meet the intervener's allegations with respect to section 12 and in our view the balance of the evidence does not support the intervener's allegations with respect to section 12. The intervener's allegations with respect to section 12 are therefore dismissed.

17. The applicant is seeking certification with respect to employees in the province of Ontario. The collective agreement is effective throughout the province of Ontario. This is a displacement application and the appropriate bargaining unit is therefore the bargaining unit in the collective agreement. The Board therefore finds that all insulation mechanics and insulation mechanics' apprentices in the employ of the respondent in the province of Ontario, save and except non-working foreman and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

18. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on May 7, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

19. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

20. Voters will be asked to indicate whether or not they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

21. The matter is referred to the Registrar.

1301-79-JD Bricklayers, Masons Independent Union of Canada – Local 1, (Hereinafter Local 1) Complainant, v. **Napev Construction Ltd.**, Venice Masonry Contractors (Toronto) Limited Co., and International Union of Bricklayers and Allied Craftsmen – Local 2, (Hereinafter Local 2) Respondents, v. Masonry Contractors Association (Toronto) Incorporated, Intervener, v. Masonry Contractors Association of Ontario, Intervener.

Collective agreement – Construction Industry – Jurisdictional dispute – Whether filing grievance alleging violation of sub-contracting clause is “requiring an employer to assign” work within the meaning of section 81 – Whether general contractor is “employer” when work is sub-contracted – Sub-contractor assigning work – No direct request made of sub-contractor to assign work to grieving union – Conditions precedent to section 81 complaint not established

BEFORE: George W. Adams, Chairman and Board Members H. J. F. Ade and D. B. Archer.

APPEARANCES: *N. A. Endicott, John Lang, Otello Ungaro and John Meiorin for the Applicant; A. M. Minsky and John Zanussi for the Respondent, International Union of Bricklayers and Allied Craftsmen – Local 2; Steven McCormack, F. R. von Veh, P. Shishkov and N. Shishkov for the Respondent, Napev Construction Ltd.; Howard W. Isenberg for the Respondent, Venice Masonry Contractors (Toronto) Limited Co.; Gerald B. Yasskin and Stanley Sherr for the Intervener, Masonry Contractors Association (Toronto) Incorporated; and R. D. Perkins for the Intervener, Masonry Contractors Association of Ontario.*

DECISION OF THE BOARD; February 5, 1980

1. The complainant requests that the Board issue a direction under section 81 of *The Labour Relations Act* with respect to an alleged assignment of work. The work consists of an 80 unit senior citizen project known as Ontario Housing Project 6 under construction by Napev Construction Limited (hereinafter referred to as “Napev”). The masonry subcontractor is Venice Masonry Contractors (Toronto) Limited Co. (hereinafter referred to as “Venice”) whose employees are members of the complainant. Venice and the complainant are parties to a collective agreement. Venice is a member of the Masonry Contractors’ Association of Toronto (hereinafter referred to as “MCAT”) and the complainant has an agreement with this group of contractors.

2. This complaint arises out of the complainant’s concern about a grievance and section 112a proceeding lodged by the International Union of Bricklayers and Allied Craftsmen, Local 2 (hereinafter referred to as “Local 2”) against Napev alleging that Napev is bound to a collective agreement which requires that it subcontract masonry work only to employers who employ members of Local 2. The matter came before the Board in File No. 0534-79-M whereupon MCAT, Venice and the complainant sought to intervene, claiming they would be adversely affected by any Board order directing Napev to use only masonry subcontractors employing members of Local 2. They also contend that the underlying grievance is a jurisdictional dispute between the two unions and that they were proper parties to such a dispute. The panel of the Board to which the grievance was referred ruled that the interveners did not have sufficient status to participate in the hearing as parties. It reasoned that none of them were bound by the collective agreement alleged to be binding upon Local

2 and Napev, although they might be incidentally or commercially affected by a determination as to the merits of the grievance. However, in accordance with Board practice, the panel granted an adjournment to provide an opportunity for the filing of a section 81 complaint if any of the interveners so chose. (See Board decision dated September 17, 1979 and *Artex Precast Limited*, Board File No. 1733-79-JD, unreported decision dated May 28, 1976, for an articulation of this adjournment policy.) In granting the adjournment that panel of the Board was careful not to make a ruling on whether or not a jurisdictional dispute existed within the meaning of section 81(1).

3. At the outset of the instant proceedings counsel for Local 2 requested that the complaint be dismissed on the basis that the complainant had not brought a work assignment before the Board within the meaning of section 81(1) of the Act. It was counsel's submission that to trigger the subsection, a request for work must have been made by Local 2 of Venice, the employer. Counsel was unaware of any such request and he noted that the complainant's filings made no such allegation. In response to this motion, and in accordance with Board practice, the Board required the complainant to satisfy it that section 81 had application.

4. It was agreed that the panel could examine and rely upon the wording of Local 2's grievance filed in Board File 0534-79-M. The application therein makes reference to and appends a copy of a grievance dated June 13, 1979 from Robins and Partners, the applicant's solicitors, and directed to the respondent, Napev. This letter reads:

Dear Sirs,

Re: Collective Agreement between Napev Construction Limited and The Toronto Building and Construction Trades Council dated March 14th, 1974

Re: Violation by Napev Construction Limited of the said Collective Agreement

Re: O.H.C. Senior Citizens' Project, Dunlop Street, Richmond Hill ("the Project")

We wish to advise that we are the solicitors for the Toronto Building and Construction Trades Council ("the Council") and the International Union of Bricklayers and Allied Craftsmen, Local 2 ("Local 2") and are now retained with respect to the following grievance.

By collective agreement dated March 14th, 1974 made between Napev Construction Limited ("Napev") and the Council ("the Collective Agreement"), the parties agreed, *inter alia*, as follows:

- "2. The company recognizes the Council and its affiliated unions as the collective bargaining agency for all its employees.
3. The Company agrees that it will employ only members of the unions affiliated with the Council and will let contracts or sub-contracts only to in-

dividuals or companies whose employees are members in good standing in the unions affiliated with the Council and will do all things necessary to insure that only members of the unions affiliated with the Council are employed in construction work in which the Company is engaged.

5. The Company agrees to recognize and be bound by the agreements existing between each of the unions affiliated with the Council and the Toronto Construction Association and specifically agrees that the provisions relating to wages, hours and working conditions set forth in the said agreements shall be binding upon the Company. In the event any of the said conditions of any of the said agreements are altered or amended at any time during the currency of this agreement, the Company shall be bound by such alterations and amendments . . .”

We hereby notify you that the Council and Local 2 on their own behalf and on behalf of certain unemployed members of Local 2, grieve that Napev has violated and continues to violate the Collective Agreement, as follows:

1. From and after June 1st, 1979, and continuing as of the date hereof, Napev has failed or refused to let or sub-contract the masonry work at the Project “. . . only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council . . .” as required by Article 3 of the Collective Agreement and has thereby breached the provincial collective agreement between The International Union of Bricklayers and Allied Craftsmen and the Ontario Provincial Conference of International Union of Bricklayers and Allied Craftsmen and the Masonry Industry Employers Council of Ontario Dated May 1st, 1978 (“the Bricklayers Agreement”), Article 1(c) thereof;

2. Further, or alternatively, Napev has failed or refused to “. . . employ only members of the unions affiliated with the Council . . .” to perform the above described work at the Project as required by Article 3 of the Collective Agreement and thereby has breached the Bricklayers Agreement, Article 5 thereof;

3. Napev has failed or refused to “. . . do all things necessary to insure that only members of unions affiliated with the Council are employed in construction work in which the company is engaged . . .” with respect to the Project, as required by Article 3 of the Collective Agreement.

At all material times to this grievance, there have been, and still are:

- (i) “. . . individuals or companies whose employees are members in good standing in the unions affiliated with the Council . . .”;
- (ii) “. . . members of the unions affiliated with the Council . . .”

who are qualified to perform the above-mentioned work at the Project and these individuals, companies and members, as the case may be, are and have been, ready, willing and able to perform this work for Napev at the said Project.

RELIEF SOUGHT:

- (a) A Declaration that Napev has violated and continues to violate the Collective Agreement and the Bricklayers Agreement, as hereinbefore set forth;
- (b) An Order that Napev cease and desist from continuing to violate the Collective Agreement and the Bricklayers Agreement, as hereinbefore set forth;
- (c) An Order that Napev let contracts or sub-contracts in connection with the hereinbefore mentioned work at the Project "... only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council ...", in accordance with Article 3 of the Collective Agreement and in accordance with Article 1(c) of the Bricklayers Agreement;
- (d) Further, or in the alternative, an Order that Napev forthwith "... employ only members of the unions affiliated with the Council ..." to perform the hereinbefore mentioned work at the Project, in accordance with Articles 2, 3 and 5 of the Collective Agreement and in accordance with Article 5 of the Bricklayers Agreement;
- (e) An Order that Napev cease and desist from employing or continuing to employ persons or permitting persons to be employed at its Project who are not members in good standing of unions affiliated with the Council;
- (f) An Order that Napev "... do all things necessary to insure that only members of the unions affiliated with the Council are employed in construction work in which the company is engaged ...", in accordance with Article 3 of the Collective Agreement;
- (g) An Order that Napev forthwith apply the full terms and conditions of the Collective Agreement and the Bricklayers Agreement at its Project at which it is now engaged or such other projects as it may in the future be engaged and, without limiting the generality of the foregoing, an Order that Napev
 - (i) pay to and on behalf of the said employees, proper wages, overtime, and vacation pay and travelling allowances as and when required by the Bricklayers Agreement;
 - (ii) make and remit the required contributions and payments for fringe and related benefits as and when required by the Bricklayers Agreement;
- (h) Damages against Napev by reason of the aforementioned violations of the Collective Agreement and the Bricklayers Agreement, including interest on the arrears for each month or part thereof in which Napev has been in default with respect to the con-

tributions and payments required under the collective agreements;

- (i) An Order that Napev pay to the Council and Local 2 such fees and expenses, legal or otherwise, as it may have incurred by reason of the aforementioned violations of the Collective Agreement and the Bricklayers Agreement;
- (j) Such further and other relief as may be appropriate in the circumstances.

We wish to point out that Napev is now violating the Board's directions made in its decision dated April 26th, 1979 (O.L.R.B. File No. 2121-78-M) wherein the Board directed that Napev abide by the terms of the various provincial agreements which are now binding on the affiliated unions of the Council. Unless the conduct complained of herein is forthwith rectified by Napev, we are instructed to refer this grievance to arbitration by the Ontario Labour Relations Board pursuant to Section 112a of the Labour Relations Act and of course, intend to bring to the Board's attention Napev's breach of the Board's direction, as aforesaid."

5. Counsel to the complainant directed the Board's attention to a growing number of cases before labour boards and courts with events centering on the impact of "subcontracting" clauses. He submitted that the instant case was but another example of such controversy and that such cases were clearly the product of jurisdictional conflict. However, if a formal request for work was necessary in order to trigger section 81, he further contended that the execution of the agreement between Napev and The Toronto Building and Construction Trade Council (hereinafter referred to as "the Council") dated March 14, 1974 or the grievance filed by Local 2 dated July 13, 1979 established that Local 2 is "requiring an employer . . . to assign particular work to persons in a particular trade union . . ." within the meaning of section 81(1). In making this argument the complainant relied heavily on the Board's decision in *The Metropolitan Toronto Apartment Builders Association* case [1978] OLRB Rep. Nov. 1022 at 1034 where the then Chairman of the Board made the following comment with respect to the apparent interrelationship between subcontracting clauses and section 81(1) of the Act:

"The Board has made it clear that the enforcement of a sub-contracting clause against a general contractor can be intercepted as a requirement that an employer assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another trade union or in another trade, craft or class within the meaning of section 81(1) of the *Labour Relations Act*. See *Beer Precast Concrete Limited*, [1969] OLRB Rep. Jan. 1108, *Donaldson Barron Ltd.*, OLRB Rep. Dec. 793 and, for a general discussion of what constitutes a jurisdictional dispute, *Eamon Riggs Limited*, [1978] OLRB Rep. Mar. 228. Given the Board's decisions that an attempt to enforce a subcontracting clause against a general contractor can set in motion the section 81 procedure, it would appear to follow that the natural operation of a sub-contracting clause can also give rise to the same legal result. In other words, once a contract is let pursuant to a sub-contract-

ing clause, then at that point it can be said that a trade union is requiring an employer to assign particular work to persons in a particular trade union rather than to some other trade union, giving access to the jurisdictional dispute procedures under section 81. The jurisdictional dispute only materialises when the contract is let, as it is at that point that there comes into existence a particular work assignment flowing from the sub-contracting provision.”

6. Counsel for Local 2 submitted that the foregoing view was an obiter statement and, if taken literally, is clearly inconsistent with the overwhelming weight of authority on the meaning of section 81(1) of *The Labour Relations Act*. He emphasized that the complainant adduced no evidence establishing that Local 2 has asked Venice to assign the masonry work to its members nor was their evidence adduced that Napev had approached Venice on behalf of Local 2 and requested the masonry work be assigned to Local 2 members. He contended that the existence of such evidence is fundamental to this Board having jurisdiction under section 81(1). It was his submission that the term “employer” in section 81(1) is clearly a reference to a contractor who directly assigns work to members of a trade union (i.e. someone who directly employs employees to perform the work in question) and cannot be interpreted to include a general contractor who has contracted with a subcontractor for the performance of certain work. Thus, it was his submission that the subcontractor initially assigns the work to persons in a particular trade union and when another trade union seeks to require that subcontractor to change the initial work assignment to its member, section 81(1) is triggered. He referred the Board to a long line of authority supporting this interpretation of the section including *Eamon Riggs Limited*, [1978] OLRB Rep. Mar. 228; *Donaldson-Barron Limited*, [1976] OLRB Rep. Dec. 793; *Artex Precast Limited*, Board File No. 1733-75-JD, unreported decision dated December 23, 1976; *Day Signs Limited*, [1976] OLRB Rep. May 217; *C. A. Pitts Engineering*, [1973] OLRB Rep. Feb. 85; *Northdown Drywall and Construction Limited*, [1972] OLRB Rep. June 666; *Ellis Don Limited*, [1972] OLRB Rep. Jan. 74; *Beer Precast Concrete Limited*, [1969] OLRB Rep. Jan. 1108. He also acknowledged that many of these cases and others cited therein, while confirming the principle he relied on, established that a general contractor could act as “an agent” for a trade union requiring an assignment of work from an employer. However, he contended that in the facts at hand there simply was no evidence proving that Napev had approached Venice on Local 2’s behalf requesting that the work be assigned to Local 2’s members. Indeed, as counsel for the Masonry Contractors Association of Ontario pointed out, no evidence was presented to the Board establishing the details of the contractual relationship between Napev and Venice and the degree of control that Napev might properly assert over Venice.

7. The Masonry Contractors Association (Toronto) Inc. and the Masonry Contractors Association of Ontario supported Local 2’s position in this respect whereas Napev and Venice supported the position urged by the complainant.

8. To resolve the issue before us, it is necessary to review the application of section 81 since its inception. Given the recent collective bargaining conflict and litigious history between the complainant and Local 2, it is difficult to deny the competitive or jurisdictional nature, if you will, of the differences between them (although we would note that each union is centrally based on the same trade skills which is unlike the more conventional nature of jurisdictional conflict). However, section 81(1) does not employ the general term “jurisdic-

tion” in fashioning the Board’s mandate, but instead specifically provides the Board with discretionary power to inquire into a complaint that a trade union is or was requiring an employer to assign particular work to persons in a particular trade union rather than to persons in another trade union, to paraphrase a portion of the subsection. The Board, therefore, is not provided with a broad mandate to inquire into any phenomenon having its origin bred of competitive jurisdictional conflict. Rather, the subsection is cast much narrower, restricting the Board’s intervention to specific acts of conflict that tend to disrupt a construction project or site. Moreover, given the close association between craft jurisdiction and construction industry stability, there may be good reason why this Board has not been provided with a broad preventive mandate to inquire into all things “jurisdictional.” Some friction in this respect is likely always to be present and, thus, the section is targeted at the most overt manifestations.

9. Section 81(1) currently provides:

“81. – (1) The Board may inquire into a complaint that a trade union or council of trade unions, or an officer, official or *agent* of a trade union or council of trade unions, was or is requiring *an employer* or an employers’ organization to assign particular work to persons in a particular trade union or in a particular craft of class rather than to persons in another trade union or in another trade, craft or class, or that an employer was or is assigning work to persons in a particular trade union rather than to persons in another trade union, and it shall direct what action, if any, the employer, the employers’ organization, the trade union or the council of trade unions or any officer, official or agent of any of them or any person shall do or refrain from doing with respect to the assignment of work.” [our emphasis]

It is the complainant’s position that Local 2’s grievance against Napev or the subcontract provision in the agreement between them constitutes a request of an employer by a trade union that work be assigned to its members. Can the subsection reasonably be so interpreted?

10. To begin our analysis, we note that while Napev might be described as an employer for the purposes of the agreement with Local 2, there is no evidence that Napev directly employs any bricklayers or masons at the subject site. It, of course, subcontracted this work to Venice. However, subsection 81(1) would appear to be referring to an employer who is directly performing “the particular work” because it describes this work as work the employer had initially *assigned* “to persons in another trade union.” If Napev can be said to have assigned any work, it assigned masonry work to another employer – a subcontractor. The subcontractor (Venice) in turn directly assigned this work to persons in a trade union, i.e. members of Local 1. Thus, on a close reading of the subsection, the term employer is more reasonably referable to Venice than to Napev. The only way to avoid the implications of this interpretation would be to “look through” Venice and equate the subcontracting of the masonry work to Venice as being, in fact, an assignment of work by Napev to members of Local 1. However, this approach ignores the substantial history of interpretation accorded to the subsection and makes a difficult equation between the verbs “assign” and “subcontract.” On this latter point, an assignment of work in industrial relations more usually describes the direct allocation of work by an employer to his employees or, at least, to

persons in a particular trade union. And in the context of a jurisdictional dispute under section 81, the section contemplates that the Board might have to alter this assignment in order to resolve the conflict. On the other hand, the contractual relationship between Napev and Venice is usually described as a subcontract. But, if any doubt remains, legal precedent underpinning this subsection renders these initial impressions indisputable.

11. Until 1960, no particular machinery existed in Ontario to settle jurisdictional disputes in the construction industry. This situation proved unsatisfactory and following a long study and publication of the *Report of the Select Committee on Labour Relations* (1958), *The Labour Relations Act* was amended in 1960 by enacting the then sections 66 and 76. Section 76 empowered the Lieutenant Governor-in-Council to appoint one or more jurisdictional disputes commissions each composed of one or more persons. Section 66(1) read as follows:

“66(1). Upon complaint to the Board that a trade union or council of trade unions, or an officer, official or agent of a trade union or council of trade unions, was or is requiring an employer or an employers’ organization to assign particular work to employees in a particular trade union or in a particular trade, craft or class rather than to employees in another trade union or in another trade, craft or class, or that an employer was or is assigning particular work to employees in a particular trade union rather than to employees in another trade union, a jurisdictional disputes commission may, after consulting any person, employers’ organization, trade union or council of trade unions that in its opinion may be affected by the complaint, make such interim order with respect to the assignment of the work as it in its discretion deems proper in the circumstances, and the employer, employers’ organization, trade union, council of trade unions and the officers, officials or agents of any of them shall comply with the interim order.”

12. It is apparent from this wording that the provision, as originally drafted, was aimed at on-site jurisdictional assignment made by an “employer” to his “employees.” In fact, it was the very strict legal interpretation holding that the “requiring” trade union had to be claiming the work on behalf of current or existing employees of the employer that caused havoc in the application of the section and eventually gave rise to an amendment substituting the now existing term “persons” for “employees.” This decision was rendered in *Regina v. Orliffe Ex parte Can. Pittsburgh Ind. Ltd.* [1961] O.W.N. 223 by Chief Justice McRuer. The case dealt with an allegation that certain work being done under the applicant’s collective agreement with the chemical workers union and the painters union belonged to the bridge workers union under an agreement between the painters union and the bridge union. This work, it was alleged, should have been done by composite crews of bridge workers and members of the carpenters union, but the applicant had no employees who were members of either of these latter two unions. The Chief Justice held that by using the word employees the section contemplated only those disputes that arise with respect to the assignment of work by an employer among those that are actively engaged on the work over which he has direction. While this restrictive interpretation of the word employee might not be given if the same application were brought today (See *Blouin Drywall Contractors Ltd.* (1975), 75 CLLC ¶14,295 there can be little doubt that the section, as initially drafted, was addressing itself to direct work assignments from employees to persons who were or who could become employees and not to contractual relations between general contractors and their subcon-

tractors (See also, to the same effect, *Regina v. Jurisdictional Disputes Commission, Ex parte Wood, Wire & Metal Lathers' International Union* [1963] 2 O.R. 698; *Regina v. Ontario Labour Relations Board, Ex parte Bennett & Wright Ltd.*, [1968] 2 O.R. 168; *Regina v. Ontario Labour Relations Board, Ex parte International Association of Bridge, Structural & Ornamental Ironworkers, Local 736* [1969] 1 O.R. 405; the latter case making it clear that the subsection nowhere limits its applicability to disputes between unions having collective bargaining rights with the employer involved). This situation was reviewed by the Goldenberg Commission appointed in 1961 to inquire into labour-management relations in the construction industry and at page 53 of the Commission's 1962 report it was recommended "that the word persons be substituted for the word employees in section 61(1) . . . so that a jurisdictional disputes commission may have jurisdiction to receive complaints from unions whether or not they have members in the employ of the employer or employers' organization concerned."

13. While this recommendation was not immediately acted upon by the Legislature, see *The Labour Relations Amendment Act, 1970 (No. 2)*, S.O. 1970, c. 85, s. 30, many other of the Commission's important recommendations were and, in 1966, the Act was further amended to give the Ontario Labour Relations Board direct responsibility for exercising all the powers previously held by the special commission. However, for the purposes of this complaint, it is crucial to note that no amendment was made to the word employer and litigation over its meaning in relation to the interaction between trade unions and general contractors has remained unaffected.

14. An early and important case in this respect is *Beer Precast Concrete Limited* [1969] OLRB Rep. Jan. 1108. Pigott Construction Company Limited, the general contractor at the University of Guelph Physical Science complex, had subcontracted the erection of precast wall cladding to Beer Precast, the complainant. Beer had assigned all of this work to the respondent Labourers' Union, Local 506 with the exception of certain tasks which Beer had assigned to the respondent Ironworkers, Local 736. This latter assignment was made by Beer at the request of Pigott and was the subject matter of the complaint. The Ironworkers objected to the Board taking jurisdiction on the basis that it was Pigott Construction, the general contractor on the project, and not the Ironworkers, Local 736 who required the complainant to assign part of the disputed work to ironworkers. However, the Board ruled that it had jurisdiction subject to Beer Precast being able to adduce evidence to support its allegations that it was the Ironworkers, Local 736 who required Pigott to make the complainant hire an ironworker for a part of the work in dispute. The Board then adjourned to permit Local 736 to challenge this ruling in the courts and the Ontario Supreme Court in *Regina v. Ontario Labour Relations Board, Ex parte International Association of Bridge, Structural & Ornamental Ironworkers, Local 736* [1969] 1 O.R. 405 upheld the Board's order. In doing so, the Court based its reasoning on the proper meaning to be attributed to the phrase in the subsection "or agent of a trade union", holding that it was open for the complainant to prove that the Ironworkers' Union instigated or caused the action of Pigott alleged in the complaint and that, therefore, Pigott was acting as the Ironworkers' agent within the meaning of the subsection. On this point the Court had the following to say (at page 411):

"From a consideration of the wording of that paragraph and also of the other paragraphs of the complaint it is plain that the gist of Beer's complaint is the allegation that Iron Workers instigated or caused the action

of Pigott alleged in the complaint. Whether that allegation has been proved is a question of fact within the exclusive jurisdiction of the Board.

In my opinion the word “agent” as used in s. 66(1) is used in its ordinary colloquial sense. The Oxford English Dictionary (1888 edition) gives as one of the meanings of agent:

4. Of persons: One who does the actual work of anything, as distinguished from the instigator or employer; hence, one who acts for another, a deputy, steward, factor, substitute, representative or emissary. (In this sense the word has numerous specific applications in commerce, politics, law etc., flowing directly from the general meaning.)

Having regard to its context and the purpose of the statute in which it is found I am satisfied that “agent” in s. 66 is used in its broad general sense rather than in a narrow specialized sense such as is found in the law of contracts. To hold that a union could avoid the effect of s. 66 by interposing some third person or agency to do the requiring would give s. 66 an unduly restrictive meaning and frustrate the plain purpose of the enactment.”

The matter then returned to the Board for Beer to establish the agency relationship. Before the Board the subcontract between Pigott and Beer was entered into evidence wherein Beer Precast undertook only to employ persons with union affiliations that were compatible with the conditions under which Pigott was carrying on its contract with the owner and under conditions which were satisfactory to Pigott. Also introduced was a collective agreement between Pigott and the Ironworkers wherein Pigott undertook not to subcontract any work covered by the agreement to any person or corporation which was not in contractual relationship with the Ironworkers’ Union. The evidence indicated that, on Beer commencing the work by employing members of Labourers’ Local 506, the Ironworkers’ Union filed a grievance under its agreement with Pigott alleging a violation of the subcontract clause. A board of arbitration found that Pigott was in fact in breach of the agreement by its subcontract with Beer Precast, following which Pigott wrote to Beer requesting that Beer employ “the required categories of employees. . . .” There was also evidence of direct conversations between Beer officials and an Ironworkers’ business agent advising Beer that if it did not employ ironworkers on the job it was going to “chase Beer all over Canada.” The Board concluded, on the basis of all the evidence, that Pigott had acted as the Ironworkers’ agent noting that Pigott had not taken over the contract from Beer Precast and the Ironworkers were content to have Beer Precast retain its contract with Pigott. In this respect the Board reasoned (at page 1113):

“The board of arbitration referred to above found that Pigott acted in breach of its collective agreement with the Ironworkers’ Locals 736 and 721 by subcontracting the erection of precast cladding on the University of Guelph project to Beer Precast. Pigott, however, did not cancel or take over the contract of Beer precast to hire ironworkers to perform certain of the erection work over which the Ironworkers claimed juris-

diction. Pigott was motivated to do so because only this course of action would mollify the Ironworkers.

It was admitted that the Ironworkers had been trying for some period of time to make Beer Precast hire ironworkers to do certain phases of the work in dispute. Based on the evidence it is fair to say that the Ironworkers were content to have Beer Precast retain its contract with Pigott, provided that Beer Precast recognized the jurisdictional claim of the Ironworkers to parts of the erection work and employed ironworkers to do that work. To ensure such recognition the evidence supports the conclusion that the Ironworkers applied pressure to, or instigated, Pigott to require Beer Precast to employ ironworkers. Stated another way, Pigott was the agent of the Ironworkers, as the word "agent" in section 66(1) of the Act is interpreted by Mr. Justice Fraser, in requiring Beer Precast to hire a member of the Ironworkers' Local 736. We would add that, in any event, on the evidence we find that the Ironworkers' Local 736 directly, without the aegis of Pigott, also required Beer Precast to hire one of its members.

The Board accordingly finds that Beer Precast has established in evidence the material facts upon which it relies in its complaint. The conditions precedent to the Board taking jurisdiction under section 66(1), in this regard, have been satisfied."

15. All subsequent cases have followed this same approach to the interaction of general contractors and trade unions in the context of jurisdictional conflict with many of the cases exhibiting a real reluctance to conclude an agency relationship without the clearest of evidence. For example, in *ABE Dick Masonry Limited* [1972] OLRB Rep. Jan. 74 a general contractor under collective agreement with the Carpenters' Union subcontracted masonry work to a subcontractor under contract with the Labourers' Union contrary to a subcontract clause in its collective agreement with the Carpenters' Union. At paragraph 4 of the decision, the Board noted the latent jurisdictional conflict between the two unions, but went on to point out that the Carpenters were not seeking the work from the subcontractor ABE Dick.

"Lurking in the background there is undoubtedly a jurisdictional dispute between the Carpenters and Labourers. However, the Carpenters are proceeding to arbitration under their collective agreement with Tri-com and are not threatening a work stoppage. The Carpenters advised the Board that in these proceedings they are not seeking an assignment of work from ABE Dick and would not except such an assignment. They are content to pursue their lawful remedy under the collective agreement."

The Board concluded that while the general contractor and the Carpenters' Union might have the same interest in that the general contractor's pursuit of its own interest might benefit the Carpenters' Union, the situation fell short of the evidence adduced in the Beer Precast situation and did not elevate the general contractor to the status of an agent for the Carpenters' Union.

16. Similarly, in *Ellis Don Limited* [1972] OLRB Rep. Mar. 215 a general contractor subcontracted work to a subcontractor having a collective bargaining relationship with the Lathers' Union and not the Carpenters' Union as the general contractor was obligated to under its agreement with the latter trade union. The Carpenters' Union filed a grievance against the general contractor and it, in turn, wrote to the subcontractor advising the subcontractor that it would be held liable for all costs associated with the grievance. Before the Board the Carpenters' Union took the position that the complainant general contractor was not the employer who made the work assignment and that, although the Carpenters claimed jurisdiction over the work, they were not requiring the complainant to assign the work to them. The Board dismissed the complaint on the basis of both objections and wrote the following passage at paragraph 11:

"We note that unlike section 123 of the Act, subsection (1) of section 81 does not specifically provide that the Board may inquire into a complaint "of an interested party". Be that as it may, let us assume for purposes of argument, but without so finding, that *Ellis Don Limited* is a party which can make the instant complaint. Based on the evidence before us, only Acme qualifies as "an employer" within the meaning of the said subsection since it is the employer who assigned the work which is the subject-matter of the complaint. Acme, however, was not required by a trade union to assign particular work to persons in a particular trade union rather than to persons in another trade union and did not of its own initiative assign particular work to persons in a particular trade union rather than to persons in another trade union. More specifically, Acme assigned the work involved in the installation of drywall systems and direct-hung grid ceiling systems on the Thompson Building to persons in its employ who are lathers. But Acme cannot be said to have assigned the work to Lathers rather than Carpenters since the respondent Carpenters at no time advised Acme that they claimed jurisdiction over the said work and in no manner sought to require Acme to assign the work to members of their craft. Moreover, the complainant, *Ellis Don Limited*, at no time and in no manner sought to require Acme to assign the said work to Carpenters rather than Lathers. This being so, in fact, there is no work assignment dispute within the meaning of subsection (1) of section 81 of the Act. The Board therefore is without jurisdiction to entertain the instant complaint."

17. Other cases, all to the same effect, are *Northdown Drywall and Construction Limited* (1972), 72 CLLC ¶16,064; *Deep Foundations Limited* [1975] OLRB Rep. Jan. 66; *Day Signs Limited* [1976] OLRB Rep. May 217; *Artex Precast Limited*, *supra*; *Donaldson-Barron Limited* [1976] OLRB Rep. Dec. 793; and *Eaman Riggs Limited* [1978] OLRB Rep. Mar. 228. Of particular note, however, is the following paragraph taken from the *Day Signs* decision suggesting that the mere enforcement of a subcontract clause may not be sufficient to trigger a jurisdictional dispute if the grievance only reveals that the union does not wish a particular employer to perform the work in question.

"It is clear from the evidence that there is some considerable doubt whether Day would qualify as a potential signatory to the collective agreement between ECAT and the complainant. However, be that as it

may, we interpret the evidence as not establishing that the complainant unequivocally desired the work in dispute from Day. The behaviour of the complainant is far more consistent with a desire to have the work in dispute not performed by Day but rather by a signatory to the collective agreement between ECAT and the complainant. We note in passing that the presence of representatives from Ainsworth and ECAT at the meeting and the presence of a representative from ECAT at the hearing appears to indicate that such a desire is not solely attributable to the complainant. In our view, in order for a trade union to satisfy the phrase "was or is requiring" in section 81(1), it must demonstrate an unequivocal interest in the work in dispute with respect to the employer or employer's organization which is directly involved in the dispute. It is not sufficient for a trade union merely to show that it does not wish a particular employer to perform the work in dispute."

This particular interpretive approach to section 81(1) appears to reflect the unique shape and stability of construction industry labour relations thoughtfully outlined by the British Columbia Labour Relations Board in *R. M. Hardy & Associates Ltd.* [1978] 2 Can. LRBR 357 and the fact that both labour boards and courts have held subcontracting clauses to be lawful contractual provisions. But the same *Hardy* decision highlights that board's concern that these provisions not be unfairly used by aggressors in jurisdictional battles. (See also *Duke Point Development Limited et al*, August 8, 1979, unreported decision of B.C.L.R.B.) However, the Ontario Labour Relations Board's position in this respect cannot be determined on the facts at hand given the wording of the Ontario Statute. The evidence does not reveal the terms of contract between Napev, the general contractor, and its subcontractor Venice. In addition, there has not yet been an arbitration of Local 2's grievance, the result of which may or may not cause Napev to take steps against Venice's existing assignment of the work in dispute. At that point, a set of concrete facts might exist against which the agency status of Napev on behalf of Local 2 could be reviewed.

18. For all of the foregoing reasons we are of the view that the facts before us do not raise a jurisdictional dispute within the meaning of section 81(1). There is abundant authority contrary to the conclusion that the mere launching of a grievance by a trade union against a general contractor constitutes a request for work to subcontractors who may have made a work assignment that offends a subcontracting provision in the general contractor's collective bargaining relationship with the grieving union. Having regard to this authority, together with the clear words of subsection 81(1), we do not believe the panel in the *Metropolitan Toronto Apartment Builders Association* case intended to deviate from this approach by its obiter statement at paragraph 43. That panel was dealing with the fundamental issue of the legality of subcontracting clauses and was, in our opinion, merely raising the possible implications of section 81 for the consideration of all parties interested in the general issue of subcontracting clauses and their potential effect. That panel did not attempt an in-depth analysis of the relationship of such provisions to the wording employed in section 81 and, therefore, cannot be said to have determined the point it briefly passed upon for the purposes of section 81(1). While the existence of subcontract clauses may be symptomatic of underlying jurisdictional conflict and anxiety, the Board's mandate for intervening in this aspect of labour relations is limited by the specific words employed in section 81(1). On the basis of this wording and for the reasons outlined above, it cannot be said that once a contract is let pursuant to a subcontract clause a trade union is inevitably requiring "an employ-

er” to assign particular work to persons in a particular union. A subcontract clause in a collective agreement is a contractual arrangement between a trade union and general contractor limiting the range of subcontractors the general contractor may utilize in the construction of a project. As the analysis above demonstrates, it cannot be said that the general contractor is the employer for the purposes of section 81(1) nor can it be said, at least in the abstract, that the existence of a subcontract clause constitutes a request to all subcontractors that work be assigned to members of a particular trade union. Subcontract clauses are important elements of trade union security and stability in the construction industry and section 81 may not be able to resolve all aspects of the inconvenience they can cause to particular parties. However, because of the aforementioned paucity of facts established in the instant case, an occasion for considering the precise limitations of section 81(1) in relation to subcontract clauses does not arise.

19. This complaint is dismissed.

2097-78-M Labourers’ International Union of North America, Local 506, Applicant, v. **Napev Construction Limited** and General Contractors Section, Toronto Construction Association, Respondents

Arbitration – Construction Industry – Direction to employer to pay damages resulting from prior Board finding of breach of collective agreement – Employer hiring persons other than members of the trade union – Assessment of damages

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. Gibson and W. F. Rutherford.

APPEARANCES: *Stephen H. Grant, Gil Cragg and Peter Hitchen for the applicant; Steven McCormack and P. Shishkov for the respondents.*

DECISION OF THE BOARD; February 8, 1980

1. This matters arises out of the referral to the Board of a grievance in the construction industry pursuant to section 112a of *The Labour Relations Act*. The Board issued a decision April 4, 1979, in which it found, among other things, that the respondent, Napev Construction Limited (“Napev”) had refused to observe the terms of the provincial agreement to which it and the applicant were bound. The Provincial agreement is a collective agreement between the Labour Relations Bureau of the Ontario General Contractors Association, Ontario Masonry Constructors Association, Industrial Constructors Association of Canada, Waterproofing Contractors Association of Ontario (employer bargaining agency) and the Labourers’ International Union of North America and the Labourers International Union of North America Ontario Provincial District Council, on behalf of its affiliated Local Unions 183, 247, 491, 493, 506, 527, 607, 625, 749, 837, 1036, 1059, 1081 and 1089 (employee bargaining agency).

2. In its decision the Board directed that Napev abide by the terms of the provincial

agreement in so far as it applied to Board area #8 (i.e., the geographical area within which the applicant held bargaining rights for construction labourers employed by Napev) and, further, to complete and return to the applicant the employer remittance forms required under article 19 of the provincial agreement. The Board further directed the applicant and Napev to meet with a Labour Relations Officer of the Board and endeavour to determine the quantum of compensation owed by Napev to the applicant.

3. Napev filed the remittance forms as directed and the parties met but were unable to agree on the amount of compensation owing to the applicant. Consequently a hearing was scheduled at the request of the applicant for June 19th, for the purpose of having the Board determine the amount of compensation owing to the applicant. At the hearing the parties consented to an adjournment on the agreement of Napev that an auditor appointed by the applicant attend at Napev's office and conduct an audit of all of its records relevant to the determination of compensation owing in this matter. The audit was conducted and the auditor filed a written report with the applicant dated September 4, 1979. A copy of the auditor's report was sent to Napev together with a letter dated September 18, 1979 from the applicant. In the letter the applicant claimed payment of compensation by Napev for the following amounts:

832.50 working hours lost at \$10.32 per hour	\$8,591.39
313 welfare hours short at 1.04 pe hour	325.52
Legal fee incurred	845.05
	\$9,761.96

The letter brought no response from Napev, consequently the applicant asked the Board again to schedule a hearing for the purpose of determining the amount of compensation payable to the applicant. Its request was accompanied by a copy of the auditor's report and a copy of the applicant's letter of September 18th to Napev setting out the compensation being sought by the applicant. A hearing was held for this purpose on January 9, 1980.

4. Counsel for Napev advised the Board at the hearing that it did not challenge the accuracy of the auditor's report. The report reveals that, during the times material to the applicant's claim, Napev employed 12 labourers who were not members of the applicant and who were hired contrary to the provisions of clause 2.01 of Article 2 – Union Security, Work Jurisdiction, Assignment of Work, Sub-contracting and clause 3.01 of Article 3 – Hiring of Employees. These labourers worked a total of 832.50 hours which the applicant is claiming would have been worked by its members had Napev complied with the hiring provisions of the provincial agreement. The applicant is claiming compensation at the rate of \$10.32 an hour, the lowest wage rate for labourers set out in clause 2.01 of Article II – Wage Rates, Classifications and Vacation Pay of the "Toronto Schedule" to the provincial agreement. The report also reveals that the hours reported on the remittance forms filed by Napev pursuant to article 19 of the Provincial Agreement were deficient by 313 hours in respect of the total hours worked by construction labourers employed by Napev during the times material to this referral, including the 12 non members and 14 construction labourers who were members of the applicant. The applicant is claiming compensation for the 313 hours at a rate of \$1.04 per hour, the aggregate rate of hourly contributions required under Article 4 – Union Dues and Check-off of the provincial agreement and clauses 8.1, 8.2 and 8.3 of Article VIII – Welfare, Training & Pension of the "Toronto Schedule" to the provincial agreement. The respondent does not dispute that these clauses of the agreement were violated. Mr. G.

Craggs, Field Representative of the applicant, testified at the hearing as to the procedures by which the applicant's unemployed members are referred to employers under clause 3.01 of the provincial agreement and filed with the Board lists of unemployed members registered in the ledger of unemployed members of the applicant. The Board is satisfied on this evidence that at the times material to this referral, the applicant had sufficient members available to fulfill any orders from Napev for construction labourers pursuant to the terms of clause 3.01.

5. On this evidence, the Board's finding in its decision issued April 4th, 1979, may now be refined and stated in specific terms of the clauses of the provincial agreement which have been violated. Accordingly, the Board finds that Napev has violated clauses 2.01 and 3.01 of the agreement by hiring persons other than members of the applicant in a manner contrary to the provisions of those two clauses and employed them for a total of 832.50 hours. The Board finds that Napev has violated Article 4 of the agreement and clauses 8.1, 8.2 and 8.3 of Article VIII of the "Toronto Schedule" to the agreement by not reporting 313 hours of work on which contributions should have been made at the aggregate rate of \$1.04 per hour.

6. Insofar as the amount of compensation owing by Napev to the applicant is concerned, Napev's counsel contends that the only compensation which the applicant is entitled to claim, legal costs aside for the moment, is the payment which it would have received in union dues under Article 4 of the agreement had Napev not violated the union security and hiring clauses. The foundation of counsel's contention, briefly stated, is that the applicant is not entitled to claim the unpaid wages and trust funds contributions except on behalf of those of its members for whom it can establish were available for and willing to accept employment with Napev at the material times. If the applicant is unable to do so, in counsel's view it is not entitled to claim the unpaid wages and contributions as general damages. Applicant counsel argues that it is entitled to compensation on behalf of its members to the extent that they, as a group, have suffered damages in the form of lost opportunities to earn wages and to have contributions paid to their benefit into the relevant trust funds. Were the Board to accept Napev's argument, the effect would be that, aside from any union dues payable, the only relief to which the applicant would be entitled for the breaches of the agreement which the Board has found, would be the declaration that Napev had refused to observe the agreement and the direction that it abide by the terms of the collective agreement in future. This would be little comfort for the applicant which, in addition to its responsibilities as bargaining agent of its members employed by Napev, has the responsibility of maintaining the integrity of the provincial agreement insofar as it concerns the interest of all of the applicant's members who may from time to time be eligible for employment by Napev under the terms of the agreement. If an employer can violate the union's security and hiring provisions of the provincial agreement and face only the consequent risk of having to pay as compensation to the union only those union dues lost to it, there is little security for the bargaining agent when such a result is viewed in the context of the nature of the employment relationships and the employment patterns and practices in the construction industry. Were the Board to take this limited view of the available remedies, it would be addressing only the superficial result of the breach of the agreement and ignoring the real complaint underlying the grievance. The real complaint is that members of the applicant who should have been employed by Napev were not and thus were deprived of wages and contributions to the various trust funds and the applicant was deprived of the dues payable under Article 4. This is the complaint which must be redressed by the remedy in a way which will give effect to the agreement provisions which were violated.

7. For the foregoing reasons, since the applicant's members have been denied the opportunity to earn wages amounting to \$8,591.39 as a result of Napev's breach of clauses 2.01 and 3.01; and since Napev's failure to report 313 hours worked in accordance with Article 19 of the agreement (and as required by Article 4 and clauses 8.1, 8.2 and 8.3 of the "Toronto Schedule") has deprived the applicant or its members of the benefit of \$325.52 in contributions to those funds, we find the applicant to be entitled to the following sums: \$8,591.39 in respect of the breach of clauses 2.01 and 3.01 of the provincial agreement and \$352.52 in respect of violation of clauses 8.1, 8.2 and 8.3 of Article VIII of the "Toronto Schedule" to the agreement. The Board sees nothing in the nature of this case, however, which would cause it to vary from its consistent policy of not awarding as damages the legal costs of proceedings before the Board. Therefore the applicant's claim for \$845.05 in damages for legal costs is denied.

8. We find support for the relief granted in this case in the similarity of its situation with that in *Re McKenna Brothers Ltd. and Plumbers Union, Local 527*, 10 LAC (2d) 273 (Shime). In that case the arbitrator was dealing with a construction industry employer who, in employing persons other than members of Local 527 to do its work, had violated the hiring clause of the collective agreement between them and the arbitrator awarded compensatory damages to the union in the form and amount of wages and contributions to trust funds which would have been paid to members of the union had there been no breach of the agreement. In the words of that decision, "The company is in breach of the collective agreement and by this breach it has deprived the members of the union of earnings which it has paid to non-union members, . . . Accordingly, the only way to place the injured party in the same position is to make a monetary award in that amount." In so doing, the arbitrator was following the decision of the Ontario Court of Appeal in *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486*, 57 DLR (3d) 199. That decision set aside a judgment of the Divisional Court and restored the award of a board of arbitration which had awarded sums of money to the union for lost earnings of its members who had been available but not hired to do work which had been done by persons who were not members of the union, as well as for breaches of the vacation pay and welfare provisions of the collective agreement.

9. Having regard for all of the foregoing, the Board makes the following determination and direction pursuant to section 112a of *The Labour Relations Act*:

- (a) Napev Construction Limited has violated clauses 2.01 and 3.01 of the provincial agreement as well as clauses 8.1, 8.2 and 8.3 of Article VIII of the "Toronto Schedule" to that agreement between the Labour Relations Bureau of the Ontario General Contractors Association, Ontario Masonry Contractors Association, Industrial Contractors Association of Canada, Water-proofing Contractors Association of Ontario and Concrete Floor Contractors Association of Ontario (Employer bargaining agency) and the Labourers' International Union of North America and the Labourers' International Union of North America Ontario Provincial District Council on behalf of its affiliated Local Unions 183, 247, 491, 493, 506, 527, 597, 607, 625, 749, 837, 1036, 1059, 1081 and 1089 (employee bargaining agency (which is effective from September 19, 1978 until April 30, 1980 and to which Napev Con-

struction Limited and the Labourers' International Union of North America, Local 506 are bound.

- (b) Napev Construction Limited shall pay to the Labourers' International Union of North America, Local 506 the sum of \$8,916.91 made up as follows: \$8,591.39 for violation of Articles 2 and 3 of the provincial agreement and \$325.52 for violation of Article 4 of the provincial agreement and Article VIII of the Toronto Schedule of that agreement. The total sum of \$8,916.91 is paid in trust to the Labourers' International Union of North America, Local 506 for the general benefit of its members. The amount of \$325.52 may be distributed in accordance with the aforesaid Articles 4 and VIII and the terms of the trusts therein established.
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1603-79-U International Union, United Automobile, Aerospace & Agricultural Implement Workers of America and Local 636, Complainant, v. **Thomas Built Buses of Canada Limited**, Respondent.

Arbitration – Interference in the Trade Union – Practice and Procedure – Whether failure of company to remit dues deducted from employees' wages to the union constitutes interference with the trade union – Board declining to defer to arbitration.

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members C. G. Bourne and H. Simon.

APPEARANCES: *Len MacLean, L. Charlick and Cliff Binns for the complainant; T. F. Storie and Larry Bannon for the respondent.*

DECISION OF THE BOARD; February 8, 1980

1. The United Automobile, Aerospace and Agricultural Implement Workers of America and its Local 636 have complained to the Labour Relations Board that the grievors (the trade unions and all employees in the relevant bargaining unit) have been dealt with by the respondent company, Thomas Built Buses of Canada Limited, contrary to the provisions of sections 37, 42, 56 and 58 of *The Labour Relations Act*.

2. At the outset of the hearing, counsel for the employer raised a number of preliminary objections. His primary submission was that the Board should decline its jurisdiction to hear this complaint and defer to a board of arbitration that has been established to hear the related grievance.

3. Counsel for the union explained that the essence of the complaint rested in the allegation that the respondent has violated section 56 of the Act which reads as follows:

“No employer or employers' organization and no person acting on be-

half of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence."

4. It is common ground between the parties that a two day work interruption occurred at the respondent's plant commencing on October 3, 1979. Although the union denies liability for the work interruption, the company took steps to invoke article 5.06 of the collective agreement in effect between the parties which reads as follows:

"The Union and the employees agree that in return for such Union security they must accept the liability for any violation of the 'no strike' provisions of this agreement. Accordingly, it is agreed that in the event of any violation of the 'no strike' clause of this Agreement by the Union and/or the employees, or a group of employees, the company may at its discretion file with the Union a statement as to the appropriate penalty in the form of a cancellation of dues deduction and/or in the form of loss of seniority or a fine upon the employees. In the event that the parties are unable to agree upon the disposition of the matter, then either party may submit the dispute to a Board of Arbitration and the parties shall be bound by its decision."

The company has not submitted a grievance against the union claiming damages for the work interruption. Instead, on October 4th, the company sent the union the following statement pursuant to article 5.06 of the agreement:

"October 4, 1979.

Mr. Vern Eaton,
Chairman of Thomas Branch, Local 636,

AND

Mr. Lorne Charlick,
International Representative U.A.W.

*STATEMENT BY THE COMPANY PURSUANT TO SECTION
5.06 RE THE ILLEGAL STRIKE*

Pursuant to section 5.06 of the Collective Agreement and arising out of the illegal strike commencing on or about October 3, 1979, the Company herewith files a statement as to the appropriate penalty for breach of Article 4 of the Collective Agreement.

- (1) For each day the strike continues commencing October 3, 1979, one month's Union dues shall be withheld and not forwarded to the Financial Secretary of the Local as referred to in Section 5.04.

- (2) Each employee participating in the illegal strike commencing on or about October 3, 1979 or thereafter shall be subject to a fine in the amount of one day's pay, at base rate, for each day or part thereof on which they participated. Such deductions, to be made at a time determined by the Company following the conclusion of the illegal strike.

This statement is filed pursuant to Section 5.06 of the Collective Agreement. It in no way precludes the Company's position with respect to discipline up to and including discharge of employees for their participation in the illegal strike.

Larry Bannon,
Vice-President & General Manager."

5. Approximately 67 employees out of approximately 90 in the bargaining unit participated in the work stoppage. On October 5th the company gave a written warning to approximately 15 of the employees and notified the other 52 that they would be subject to a two-day suspension with loss of pay. Counsel for the complainant stated that the union considered that the above noted discipline administered to the employees who participated in the work interruption was a substitute for the fines proposed in the company's letter of October 4th. We note that at the hearing, however, counsel for the employer indicated that the company still intended to impose the fines.

6. In response to what the union viewed as the only outstanding penalty proposed in the company's October 4th letter filed pursuant to article 5.06 of the agreement, the union, in a letter to the company dated October 9, 1977, requested the company to withdraw its intention to withhold union dues. The union indicated that its letter should be viewed as a grievance lodged pursuant to the terms of the collective agreement.

7. In a letter which the parties agree should be dated October 26, 1979, the company informed the U.A.W. and its Local 636 of its decision to implement its previously announced intention to withhold union dues:

"This is to advise you that further to our letter of Oct. 4, 1979 and pursuant to Article 5.06 of the Collective Agreement we are withholding [sic] Union dues for the months of October and November 1979.

These funds will be held in escrow pending a decision from the board of arbitration."

It is common ground between the parties that pursuant to this letter the company declined to remit to the union dues deducted from all the employees' wages for the months of October and November, 1979. In a letter dated November 24, 1979 the company informed the union that the dues withheld totalled to \$2,385.20.

8. A board of arbitration has been constituted to hear the union's grievance challenging the employer's right to withhold union dues; a hearing has been scheduled for April 1, 1980. On November 22, 1979, the union wrote a letter to the company stating that its deci-

sion to proceed with the union grievance relating to the withholding of union dues was without prejudice to the instant complaint before the Labour Relations Board. Counsel for the union acknowledges, however, that the employer's first notice of the instant complaint was on December 4, 1979, its date of filing.

9. It is the employer's position that deducting dues from employees and failing to remit them to the union constitutes "a cancellation of dues deduction" within the meaning of article 5.06 of the collective agreement. Counsel for the employer stated that in the event that its actions in this regard are upheld either by a board of arbitration or this Board as being in compliance with the terms of the collective agreement, it intends to return the dues to the employees forthwith. The intended penalty, as characterized by the employer, therefore, focuses on depriving the union of the use of the dues rather than forcing the payment of a damage claim.

10. Counsel for the union argues that the company's failure to remit to the union dues it has deducted from employees' wages is both a violation of article 5.06 of the collective agreement and a violation of section 56 of *The Labour Relations Act*. With respect to article 5.06, union counsel submits that the company's right is limited to filing with the union a statement containing its view of the appropriate penalty. In the face of a dispute over the appropriateness of the penalty, counsel argues that the article does not entitle the employer to take unilateral action prior to the resolution of the disagreement by a board of arbitration. Additionally, counsel for the union takes the position that the "cancellation of dues deduction" referred to in article 5.06 does not encompass a refusal to remit to the union dues already collected from employees.

11. Regarding the alleged violation of section 56 of the Act, counsel contends that the employer's wrongful impounding of dues constitutes interference with the trade union and its ability to represent employees in the bargaining unit. In its view such action has the calculated effect of weakening and discrediting the union in the eyes of the employees in the bargaining unit, thus fermenting dissent and undermining the union's strength.

12. Counsel for the union commented to the Board that it had not been informed prior to the hearing that the employer intended to return the dues to the employees if its actions were upheld by this Board or a board of arbitration. Whether the dues are held by the employer to satisfy an alleged damage claim or returned to the employees, however, is, according to counsel for the union, immaterial to its position that the employer's impounding of dues is in violation of both article 5.06 of the collective agreement and section 56 of *The Labour Relations Act*.

13. Counsel for the employer requests that the Board defer to the board of arbitration which has been set up to hear the union's grievance on the grounds that the dispute is, in essence, a disagreement over the interpretation of article 5.06 of the collective agreement rather than an unfair labour practice complaint. Counsel for the union, on the other hand, characterizes the union's complaint as one that extends beyond the collective agreement to encompass an alleged unfair labour practice which has jeopardized the union's ability to act as bargaining agent for the employees in the bargaining unit. As the Board has been given the explicit jurisdiction to resolve unfair labour complaints, counsel for the union argues that this Board rather than a board of arbitration should hear the union's complaint.

14. In support of its argument that the Board should decline to defer to arbitration, counsel for the union referred the Board to its decision in *Truck Engineering Limited* [1977] OLRB Rep. Jan. 2. The facts in *Truck Engineering* are similar to the facts in the instant case. The collective agreement in effect between the parties in *Truck Engineering* contained a clause identical to section 5.06. Following a work stoppage, the employer filed a letter pursuant to the equivalent of article 5.06 indicating its "intention to claim damages for losses incurred...". The employer's letter further indicated that dues would be deducted "as per usual and held by the Company until the ... damage claim ha[d] been paid". The company in *Truck Engineering* asked the Board to defer to arbitration on the grounds that the dispute between the parties was essentially one of interpreting the respective rights of the parties under the equivalent of article 5.06 in their collective agreement. The Board declined to defer, however, on the grounds that the facts raised numerous issues which might go beyond the interpretation, application or alleged violation of the collective agreement. In its decision on the merits [1978] OLRB Rep. Jan. 70 the Board found that the employer's failure to remit dues deducted from employees' wages had been done in violation of section 56 of the Act. The Board stated at paragraph 13 of its decision,

"As distinct from the situation where an employer fails to make any dues deductions, in the instant case the respondent continued to check-off union dues from employee wages. This is thus not a case where employees could simply turn to an alternative procedure for paying their dues. Having deducted the money in the form of dues payments, the respondent failed to fulfill its responsibility of forwarding the sums to the complainant union in accordance with the terms of the employee authorizations. In doing so we are of the view that it directly interfered with the flow of union dues to the complainant from those of its members employed by the respondent, and that this unilateral action constituted a form of direct interference with the administration of the complainant contrary to section 56 of the Act. What we have here is the unilateral impounding of union dues and not a mere failure to deduct union dues from employee wages."

15. Counsel for the employer contends that a critical distinction exists between *Truck Engineering* and the instant case: *Truck Engineering Limited* held the deducted dues as ransom for the payment of damages allegedly flowing from the work stoppage rather than file a specific grievance under the collective agreement seeking damages for the work stoppage. Counsel notes that in this case, on the other hand, the employer is not holding the dues pending payment of a damage claim. The distinction between the two cases drawn by counsel for the company does, indeed, exist. The Board is not satisfied, however, that it is a material distinction for the purposes of deciding whether or not to defer to arbitration. That the company has not sought to hold the dues as security for the payment of a damage claim in this case does not diminish the union's contention that the failure to remit dues deducted, for whatever reason, undermines the union's very ability to act as bargaining agent for its employees and, in so doing, violates section 56 of *The Labour Relations Act*.

16. In *Kodak Canada Ltd.*, [1977] OLRB Rep. Feb. 49 the Board declined to defer to arbitration on an alleged violation of section 70 of the Act. The Board was persuaded that the dispute had implications which extended beyond the collective agreement and thus could not be properly characterized as simply a dispute relating to the interpretation, administration or alleged violation of the collective agreement. At page 56 the Board stated:

“At most these statements [contained in *United Gas Ltd.*, 65 CLLC ¶16,056] raise a general presumption that grievance arbitration is to be the preferred forum where that procedure has been preserved by the statutory freeze. This general presumption recognizes that disputes arising out of collective agreements, and not having implications that extend beyond those collective agreements, should be dealt with by reference to the dispute resolution procedure of grievance arbitration. However, once a dispute can be characterized as being something more than just a dispute relating to the interpretation, administration, or alleged violation of a collective agreement, this general presumption must necessarily give way. Although grievance arbitration is the proper forum for the resolution of matters relating to individual collective agreements, it is the Labour Relations Board that has been entrusted with the responsibility for resolving matters that go to the general structure of collective bargaining in this Province. Where such matters arise, therefore, it is this Board that provides the proper forum for their resolution, and deferral to grievance arbitration can no longer be the appropriate response.”

17. The allegation in this case is that the employer's failure to remit dues deducted from employees' wages has undermined the trade union and interfered with its ability to represent the employees in the bargaining unit for which it is the exclusive bargaining agent. The Board has evaluated the various aspects of the union's complaint and is satisfied that it cannot be simply characterized as a dispute relating to the interpretation, administration, or alleged violation of article 5.06 of the collective agreement. The union's complaint extends beyond the collective agreement to encompass allegations that the employer has wrongfully interfered with the union's capacity to act as bargaining agent and, in so doing, has committed an unfair labour practice in violation of section 56 of the Act. The Board is persuaded that the union's allegation of an unfair labour practice is not a spurious characterization of the matter designed to mererly cloud what is essentially a dispute over the administration, interpretation or alleged violation of the collective agreement. In these circumstances, we are of the view that this Board is the proper forum for the resolution of the union's complaint.

18. For the foregoing reasons, therefore, the Board declines to defer to arbitration and will hear the merits of the union's complaint.

19. Counsel for the employer raised an additional preliminary objection. He argued that the union had sat on its rights prior to filing this complaint and should not now be allowed to proceed. The union's complaint was filed with the Board on December 4, 1979. This period of time may either be described as approximately five weeks following notification of the implementation of the employer's previously declared intention to refuse to remit dues or four days following the conclusion of the last month for which the employer refused to remit dues. The Board is not persuaded that these time lapses constitute an unwarranted delay and will, therefore, proceed to hear the matter on its merits.

1934-79-R International Beverage Dispensers and Bartenders' Union Local 280 of the Hotel and Restaurant Employees and Bartenders International Union, AFL CIO CLC, Applicant, v. **Victoria Hotel**, Respondent.

Bargaining Unit – Certification – Craft unit sought for waiters and waitresses – Craft not established – Unit not restricted to single dining room

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *R. Ross Wells, Frank Cortese and Joe Leithwood for the applicant; J. B. Noonan for the respondent.*

DECISION OF THE BOARD; February 29, 1980

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. The applicant initially sought bargaining rights for “all full-time and part-time waitresses and waiters in the employment of the respondent in the area known as ‘Old Vic’ in the Victoria Hotel, 56 Yonge Street, Toronto, Ont.”.
4. The respondent requested the exclusion of part-time employees, and the Board thereafter dealt with the application on the basis of both a full-time and a part-time unit. The respondent raised two further issues with respect to the description of the appropriate bargaining units. In the first place, the respondent noted that the Victoria Hotel contains a second dining room known as “Muggs”, and took the position that it was inappropriate to sever the two dining rooms. Secondly, the respondent took the position that the units ought to include *all* employees employed in the two dining rooms, rather than just waiters and waitresses. This would have the effect of including busboys in the two units.
5. The dining rooms of the Victoria Hotel provide virtually identical services, including food and alcohol, although the decor is somewhat different in each. One is located upstairs and the other downstairs. The employees in both dining rooms perform the same functions, and serve out of a common kitchen. There is in fact no interchange between the actual employees working in each room.
6. The applicant argued that it has a history of being certified on a single beverage-room basis. However, no specific precedent was cited, and there is nothing before the Board to demonstrate that in cases where the Board has described the applicant’s “craft” unit in terms of a single beverage room, there was more than the one beverage room at the employer’s location. The applicant does have a collective agreement covering tapmen, bartenders, beverage waiters, bar-boys and improvers at this hotel, and the one collective agreement covers both dining rooms.
7. The Board, as always, is concerned about undue fragmentation within an employer’s place of operation (see *Eastern Ontario Health Unit*, [1976] OLRB Rep. Nov. 687).

There is nothing before it in the present case that would cause the Board to depart from its policy in that regard. Accordingly, the Board finds it to be inappropriate to separate the two dining rooms at this location for collective bargaining purposes.

8. On the question of the inclusion or exclusion of the busboys, the applicant relies heavily on the fact that the busboys, unlike the bar-boys in the applicant's normal craft unit, do not handle alcohol *at all*, and are therefore distinguishable from the waiters and waitresses in the dining room area.

9. The Board has always applied a "primarily-engaged test" in defining the limits of the applicant's beverage-employee craft unit. (See *Seaway Hotels (Ontario) Limited*, [1976] OLRB Rep. May 99; *Cedarbrae Hotels and Homes Limited*, [1973] OLRB Rep. Jan. 44; *Caswell Hotel (Sault) Limited*, [1971] OLRB Rep. July 446.) The applicant's argument on the busboys really depends upon the Board finding a second stratum of craft employees, being those employees who, while not primarily engaged to serve alcohol, handle alcohol to some extent. The Board has never gone that far, however, and indeed noted particularly in the *Cedarbrae Hotels* case, *supra*, that the craft unit normally granted to the applicant is largely the result of the mandatory nature of section 6(2) of *The Labour Relations Act*, and is granted on that basis notwithstanding the strong community of interest the members of that craft share with other employees in a hotel. In fact, concern was expressed over this phenomenon in the *Seaway Hotels (Ontario) Limited* case, [1976] OLRB Rep. Nov. 676, in particular in the concurring opinion of A. S. Gribben. The Board finds no basis for the recognition of a second craft-group composed of waiters and waitresses, as urged by the applicant in the present case. Indeed, in terms of fragmentation (and in the absence of the agreement of the parties as we have here), there may be some question as to the appropriateness of limiting a bargaining unit only to persons employed in the dining rooms of a particular hotel. We mention this only to ensure that the applicant is not taken by surprise should this issue arise in any subsequent case.

10. In light of the foregoing, therefore, the Board finds the following two bargaining units to be appropriate in the present case:

All employees of the respondent employed in the dining rooms known as the "Old Vic" and "Muggs", located in the Victoria Hotel, Toronto, save and except managers, persons above the rank of manager, and persons regularly employed for not more than 24 hours per week (hereinafter referred to as bargaining unit #1);

All employees of the respondent regularly employed for not more than 24 hours per week in the dining rooms known as the "Old Vic" and "Muggs", located in the Victoria Hotel, Toronto, save and except managers, and persons above the rank of manager (hereinafter referred to as bargaining unit #2).

11. The Board is satisfied on the basis of all the evidence before it that not less than forty-five per cent of the employees of the respondent in bargaining unit #1 at the time the application was made were members of the applicant on January 24, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

12. A representation vote will be taken of the employees of the respondent in bargaining unit #1. All employees of the respondent in bargaining unit #1 on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.
13. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.
14. The matter is referred to the Registrar.
15. The Board is satisfied on the basis of all the evidence before it that less than forty-five per cent of the employees of the respondent in bargaining unit #2 at the time the application was made, were members of the applicant on January 24, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.
16. The application is therefore dismissed with respect to bargaining unit #2.

1171-79-R Ontario Taxi Association 1688 C.L.C., Applicant, v. **Windsor Airline Limousine Services Limited** carrying on business as Veteran Cab Company, Respondent, v. Group of Employees, Objectors.

Adjournment – Certification – Constitutional law – Practice and Procedure – Section 79 – Whether taxi company engaged in regular airport and trans-border business under provincial jurisdiction – Board declining to adjourn in face of constitutional challenge – Effect of employer’s withdrawal on section 79 and section 7a proceedings

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. G. Donnelly and W. F. Rutherford.

APPEARANCES: *Michael Mitchell for the applicant; C. F. Clark, G. Skillings, Earl Fraser and Jack McDougall for the respondent; Robert Mark Sumner, Ronald James Lariviere, Stuart J. Caverhill, Louis Scarbeau, Doreen Patrick and Stanley F. Heeney for the objectors.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN, AND BOARD MEMBER W. F. RUTHERFORD; February 4, 1980

1. The name: “Windsor Airline Limousine Service Ltd. Veteran Taxi Co. (Subsidiary)” appearing in the style of cause of this application as the name of the respondent is amended to read: “Windsor Airline Limousine Services Limited carrying on business as Veteran Cab Company”.
2. This is an application for certification relating to dispatchers employed by a taxi company. Collective bargaining is a new development in the taxi industry and this case rais-

es, apparently for the first time, the issue of the extent of the Board's constitutional jurisdiction in this area of commercial activity.

3. The respondent (hereinafter referred to as Veteran Taxi) operates a local taxi service in the City of Windsor. The applicant union seeks bargaining rights for a bargaining unit of dispatchers and telephone operators employed by the respondent. Two other applications for the certification of units of drivers have also been filed by the union as well as a number of unfair labour practice complaints. At the initial hearing counsel for Veteran Taxi objected to the jurisdiction of the Board to hear this application on the grounds that Veteran Taxi is a federal undertaking within the meaning of section 92(10)(a) of the *British North America Act* (hereinafter referred to as the "B.N.A. Act"). He submitted that the labour relations of Veteran Taxi therefore fall under the provisions of the *Canada Labour Code*. On that basis he moved that the application be dismissed.

4. The Board heard extensive evidence respecting the nature of the respondent's business. Essentially it is a taxi company servicing the City of Windsor and the immediate surrounding area with radio dispatched cars. Some 132 taxis operate in Windsor under the respondent. Some are owned by Veteran Taxi and some are driver owned. While there was some variation in testimony, the evidence establishes that on average Veteran Taxi handles a daily flow of between 3000 and 3500 passenger trips. The great bulk of these trips are through the normal channel of telephone requests from customers followed by the radio dispatching of a car to their service. And the vast majority of all fares, ninety-eight percent of Veteran Taxi's business, are carried entirely within the City of Windsor and the immediate surrounding area of Ontario. It is not challenged that the respondent's business is primarily subject to provincial regulation. The respondent's cars hold public vehicle licences issued by the Ontario Ministry of Transportation and Communications. The fares which it charges for transportation in the City of Windsor and the five kilometers surrounding are regulated provincially by local by-laws of the Board of Police Commissioners for the City of Windsor made under *The Municipal Act* of the Province of Ontario, R.S.O. 1970, c. 284, s. 377, ¶1 (as amended by S.O. 1978, c. 87, s. 40(10)).

5. Part of the respondent's business involves servicing the Airport and the CN Railway Station in Windsor as well as transferring mail for CN. It also provides a light package pick-up service from industries and shippers in Detroit to customers in the Windsor area. As part of its airport and railway station service, and in the course of its general service to the locality, Veteran Taxi occasionally carries passengers and mail across the adjacent border to nearby points in the United States. The employer did not adduce in evidence any business records to clearly establish what percentage of its business involves crossing the Windsor-Detroit border, but its counsel did not dispute the proposition that all trips involving a border crossing would amount to no more than one or two percent of its business.

6. Two issues arise. The first issue is whether by virtue of its association with airline, railway and postal service the employees of Veteran Taxi are employed "in connection with the operation of any federal work, undertaking or business" within the meaning of section 108 of the *Canada Labour Code*, R.S.C. 1970, c. L-1 (as amended). If they are this Board is without jurisdiction to entertain this application. (*Eastern Canada Stevedoring Limited* [1955] S.C.R. 529; [1955] 3 D.L.R. 721). If it be found that the respondent's relationships with federal undertakings do not bring it within federal jurisdiction, the second issue is whether its own extra-provincial traffic makes Veteran Taxi a federal work or undertaking

in its own right as an undertaking extending beyond the limits of the province within the meaning of section 92(10)(a) of the B.N.A. Act. If it does this Board is likewise without jurisdiction. (*A.G. Ontario v. Winner*, [1954] A.C. 541; [1954] 4 D.L.R. 657 (J.C.P.C.); *Re Tank Truck Transport Ltd.* [1963] 1 O.R. 272; 36 D.L.R. (2d) 636 (H.Ct.)). A related issue is whether any extra-provincial components of the respondent's activities are severable from the local and provincial aspects of its business. If so the union submits that this Board has jurisdiction in respect of the ninety-eight percent of Veteran Taxi's business that is purely local and provincial in nature.

7. When faced with a challenge to its constitutional jurisdiction the Board has a clear duty to consider and rule upon the challenge, and in so doing to recite and analyze the facts as thoroughly as possible. Clear findings of fact, with some comment on the ramifications of the facts for industrial relations policy, will assist the courts in the event of a judicial review of the Board's determination. As the Board put in in *Dry Bulk Forwarders Ltd.* [1974] OLRB Rep. Sept. 629 at 632:

"The Courts are the great equalizers in the application of constitutional law principles, but neither they nor the parties should be denied the viewpoints of the inferior tribunals – viewpoints based upon the *viva voce* evidence that comes before them. Only in this way can the courts meaningfully assess the facts upon which the constitutional law principles must be applied."

It is with those principles in mind that the Board turns to consider the facts and the law applicable in the case before it.

8. We deal firstly with the respondent's connection with the Windsor Airport. The exhibits filed by the respondent establish that it has provided taxi service from the Windsor Airport at least since July of 1957. At that time, operating under the name, "Veteran Cab Company of Windsor Limited," it entered into a lease with the Department of Transport of the Government of Canada by which it was granted the use of part of the airport property for the purposes of a taxi stand. Originally it operated from its airport taxi stand under a Public Commercial Vehicle Operating License issued by the Motor Vehicles Branch of the Department of Transport of the Province of Ontario. That license, apparently issued pursuant to an order of the Ontario Highway Transport Board dated March 26, 1957, allowed the respondent to operate its vehicles:

"For the carriage of luggage and personal effects of passengers of Trans-Canada Airlines to and from the Department of Transport (Canada) Air Terminal at Windsor."

9. By Supplementary Letters Patent dated June 20, 1958 the respondent changed its name to "Windsor Airline Limousine Services Limited". On January 30, 1959 it was granted an Extra-Provincial Operating Licence by the Motor Vehicles Branch of the Ontario Department of Highways. In fact that license was issued under the authority of the *Motor Vehicle Transport Act*, S.C. 1954. That federal statute authorized the Minister of Highways of the Province of Ontario, by delegation, to license inter-provincial and international undertakings for the transport of passengers and goods by motor vehicle in the same way it could if the extra-provincial undertaking were a local undertaking. In other words,

Veteran Taxi became federally licensed as an international carrier. Its license, by its terms, is granted:

“For the carriage of passengers, air-freight in bond and passengers’ luggage, from the Department of Transport (Canada) Air Terminal at Windsor, to the international boundary at the Detroit River, for furtherance to points in the State of Michigan, as authorized; and by shipment therefrom, from the said international boundary to the said air terminal, for and on behalf of Trans-Canada Airlines.”

The above license is still held by Veteran Taxi.

10. On August 31, 1965 the respondent’s lease of premises at the Windsor Airport was terminated and replaced by a license issued under the Government Airport Concession Operations Regulations made by Order in Council P.C. 1960-1755 on December 22, 1960. That is the license under which the respondent presently operates. It gives Veteran Taxi permission, granted by the Department of Transport of Canada, to maintain and operate a taxi and limousine stand at the Windsor Airport. The license operates from September 1, 1965 on a year-to-year basis during pleasure. By its terms the respondent is obligated to pay the airport authorities five percent of the gross revenue from the limousine service to and from the airport and five percent of the gross revenue for taxi-cab service from the air terminal building. The license further provides that the respondent may deduct from its payments to the airport authorities any tolls which it is required to pay in order to carry passengers through the Detroit-Windsor tunnel.

11. Veteran Taxi has a number of other obligations under its license with the Department of Transport. Its chief obligations, however, and those most material to this application, are found in articles 12, 13 and 14 of the license, which provide as follows:

“12. That the Licensee shall maintain at the said Airport, sufficient number of motor vehicles to accommodate normal anticipated passenger traffic at the said airport.

13. That the motor vehicles used by the Licensee in the exercise of the permission hereby granted shall be of a recent manufacture, roomy and neat in appearance, and shall at all times be maintained in good running condition.

14. That the Licensee shall file with the Minister the tariff to be charged by the Licensee in respect of its operations under this License as approved by and/or filed with the appropriate Municipal, Provincial or other Public Authority having jurisdiction, and that in the absence of such controlling authority the tariff must be approved by the Minister.”

12. The evidence of Mr. John McDougall, Veteran Taxi’s Office Manager, establishes that the respondent services the airport with both limousines and taxi-cabs. The limousines consist of three vans or mini-buses which meet incoming passengers arriving on the eight or so flights arriving daily at the Windsor Airport. Passengers using the limousine serv-

ice pay a flat rate, approved by the Department of Transport, for transportation to a number of Windsor hotels as well as to hotels in Detroit. The limousine service to the hotels in both Windsor and Detroit is on a demand basis, meaning that the limousine will go only to the hotels requested by the passengers. It will therefore go to a Detroit destination only if the service is requested by a passenger. In addition to taking passengers to downtown Detroit hotels, the limousine service will carry them to some 14 other destinations in the area of Michigan surrounding Detroit and to Toledo, Ohio. Those trips, when requested, are also at flat rates fixed by agreement with the Department of Transport. Each of the three vans can carry up to ten or twelve passengers and the evidence establishes that something less than five percent of limousine customers request service into the U.S. The limousine service also makes the rounds of the downtown Windsor hotels to collect passengers for transport to the airport, also for a flat rate fee as agreed with the Department of Transport.

13. Veteran Taxi does not, however, collect passengers from any point in the U.S. for transportation to the Windsor Airport. In fact no part of the respondent's operations does this. The respondent is not licensed by any U.S. authority to pick up passengers in the United States and it does not do so in any aspect of its operations. Veteran Taxi's evidence is that it holds no U.S. licenses of any kind, whether for the pick up, delivery or carriage of either passengers or freight.

14. The limousine service carries the bulk of passenger traffic from the Windsor Airport. However Veteran Taxi's cabs also take passengers from the airport, as they are entitled to do under the license with the Department of Transport. The cabs do not charge a flat rate limousine fee. Their passengers are charged on the general meter rate established by the municipal authorities, and that is so even if they are carried into Detroit.

15. In summary, therefore, the airport service provided by Veteran Taxi is essentially a limousine and taxi service to and from locations in Windsor and surrounding localities in Ontario. That is ninety-five percent of what it does. Accepting the evidence most generous to the respondent's position, five percent of its airport business consists of taking passengers, on request and not according to any established schedule, to destinations in adjacent localities in the United States.

16. Veteran Taxi's service at the Windsor railway station, though not identical is similar to its service from the airport. By agreement with the Canadian National Railway Company, Veteran Taxi has been granted, for an annual fee, the exclusive right to operate a taxi stand at the railway's Windsor station. The most pertinent portions of the agreement in force at the time of this application, dated November 18, 1978 are as follows:

"THE RAILWAY AGREES:

5. To grant, insofar as it may lawfully do so, to the Applicant, its servants and agents, the exclusive rights, during the continuance of this Agreement, to solicit taxi cab patronage at the Railway's said Station from passengers and customers of the Railway.
8. The Railway shall provide certain parking spaces at the said Station of the Railway for the use of the Applicant's vehicles, and the Applicant shall ensure that its vehicles, when parked or stopped at the said Station, will occupy only such designated spaces.

9. Nothing herein contained is intended by the parties hereto to constitute the Applicant, its servant or agents, or any of them, as servants or agents or the Railway with respect to the service to be provided pursuant hereto."

17. The evidence establishes that the bulk of cab service from the railway station involves the transportation of passengers from the station to destinations in the City of Windsor. Passengers using the respondent's cabs from the railway station to destinations in Windsor are charged according to the general taxi meter rate established municipally. While the respondent did not file any license by which it is authorized to carry passengers extra-provincially or internationally from the railway station, the evidence establishes that it does. Depending on schedules, some four to six trains arrive in Windsor daily. By agreement with Canadian National Railways, Veteran Taxi provides two limousines which are available to carry passengers on demand from the Windsor railway station to the Amtrack station in Detroit. Two owner-driver limousines have been designated exclusively for that purpose by the respondent. Passengers using this service are charged a flat rate of \$6.00 pursuant to an agreement between the respondent and CN. Persons emerging from the railway station at Windsor may also, of course, make use of the respondent's other cabs at that location for transportation into Detroit. When they do they are charged according to the municipal meter rate. Again the respondent adduced no evidence of precise figures, but there is nothing in the evidence to suggest that the percentage of Detroit traffic from the railway station is any greater than from the airport.

18. A second aspect of the respondent's relationship with the Canadian National Railway is the transportation of mail. By an agreement between Veteran Taxi and CN made in 1968 the respondent contracted to carry mail between various Windsor railway offices and also between the Windsor railway offices and Detroit. Effective May 31, 1973 the railway took over the handling of its own mail between its Windsor offices. However it continued, as it still does, to use the services of Veteran Taxi on a five day per week basis to do a pick up of mail from the baggage room at the CN station, Windsor-Walkerville, and deliver it to the C.T.W. building on Lafayette Boulevard in Detroit.

19. Another aspect of the respondent's business which causes it to make occasional trips across the border is what it calls its Chrysler Accounts. This service in fact has nothing specifically to do with the automobile manufacturer of that name. It is, in effect, a light freight emergency courier service. Occasionally industries and business in Windsor and the surrounding region of Southern Ontario may have an urgent need for a piece of machinery, or an industrial or automotive part. Detroit is often the nearest source of such parts and Canadian businesses, especially when they have a pressing need, will obtain their needs through Detroit suppliers. This they can do by way of Veteran Taxi's Chrysler Account Service. Veteran Taxi receives a call, either from the Canadian purchaser or the Detroit supplier or shipper, requesting it to pick up a package from Detroit and to deliver it to the Canadian customer. For example, there was evidence adduced of the respondent collecting a package from an air freight shipper at the Detroit Metropolitan Airport and delivering it to a location of International Harvester Ltd. in Chatham.

20. Part of this service includes clearing the package through customs. Not all drivers are either able or willing to do this work and as a result some fifty or sixty drivers are designated as available to service the Chrysler Account calls. The company did not adduce any

evidence to establish how many Chrysler Account trips it makes in an average day. It did not, however, dispute the testimony of union witness Allan Pilecki, a dispatcher with Veteran Taxi who testified that the company makes two or three Chrysler trips a day, nor the alternative estimate of dispatcher John Garry who testified that there might be one or two Chrysler calls a day. It is clear that with a daily output of over 3000 trips, the Chrysler Account is an extremely small percentage of Veteran Taxi's business.

21. There are two other border town activities of the respondent which it raised in support of its constitutional argument. Firstly, by an understanding with the Greyhound Bus Line, when a passenger on a Greyhound bus entering Canada is refused entry at Canadian Customs the bus line will call Veteran Taxi to collect the passenger at the Canadian Customs Office and return him to the Greyhound bus terminal in Detroit. Secondly, while the respondent does not, as we have noted, collect passengers in the U.S. there is one exception. The respondent's taxis returning from Detroit do, on an occasional basis and apparently without any objection from the American authorities, pick up passengers at a waiting room depot located at the U.S. end of the Detroit-Windsor tunnel.

22. All of the foregoing are activities which constitute the one to two percent of Veteran taxi's business which extends beyond the province. It is not disputed that the great bulk of Veteran Taxi's business is confined to Ontario.

23. We turn now to consider the principles of constitutional law that must be applied to the foregoing facts. *Prima facie* the regulation of contracts of employment, hours of work, minimum wages and other aspects of employment law, including labour relations, is a matter of property and civil rights within the jurisdiction of the province (*Toronto Electric Commission v. Snider* [1925] 2 D.L.R. 5 (J.C.P.C.)). There are, however, areas of activity in which the regulation of industrial relations is reserved exclusively to the Government of Canada. Certain areas are reserved to federal authority by the terms of section 92(10)(a) of the B.N.A. Act which provide, in part, as follows:

"In each Province the Legislature may exclusively make laws in relation to
...

(10) Local works and undertakings other than such as are of the following classes:-

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province."

24. Pursuant to that section Parliament has enacted legislation governing collective bargaining in federal areas of activity. Section 108 of the *Canada Labour Code* provides:

" This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employer's organizations composed of such employees or employers."

25. Regulatory control of labour relations on a federal level can be exerted only in respect of activities which fall within federal authority by specific reference, (see *Eastern Canada Stevedoring Limited* [1955] S.C.R. 529; [1955] 3 D.L.R. 721)), by reference to the federal general or residuary power (See *Pronto Uranium Mines Ltd. and Algoma Uranium Mines Limited v. Ontario Labour Relations Board*, [1956] O.R. 862; 5 D.L.R. (2d) 341;), by the exercise of federal authority by a declaration under section 92(10)(c) of the B.N.A. Act, or by direct relation to federal government operations and federal Crown enterprises, (see *Reference Re Legislative Jurisdiction Over Hours of Labour*, [1925] S.C.R. 505; [1925] 3 D.L.R. 1114).

26. It is common ground in this case that if Veteran Taxi falls under federal jurisdiction for the purposes of labour relations it must do so by virtue of the provisions of section 92(10)(a) of the B.N.A. Act. The *Eastern Stevedoring* case confirmed that it is within the exclusive competence of the Government of Canada to regulate the industrial relations of employees who are employed "in connection with any federal work, undertaking or business", as was originally provided by the *Industrial Relations and Disputes Investigation Act*, R.S.C. 1952, c. 152 and is now provided in section 108 of the *Canada Labour Code*, *supra*.

27. The first issue raised, therefore, by the respondent's argument is whether Veteran Taxi, because of its association with the Windsor Airport, the Windsor Railway Station and its involvement in the carriage of mail is engaged "in connection with" a federal work, business or undertaking within the meaning of section 108 of the *Canada Labour Code*. In this aspect of the case the Board does not concern itself with the cross-border trips made by Veteran Taxi; the question whether the two percent extra-provincial portion of the respondent's business, be it from the airport, the railway station, or from the homes and businesses of private customers in Windsor make Veteran Taxi a federal undertaking will be dealt with later. The Board must first consider how the principles of the *Stevedoring* case apply to those parts of the respondent's business that have some relationship with federal activities.

28. The *Stevedoring* case originated with this Board when, in 1954, the United Mines Workers of America applied for certification as the bargaining agent of the Eastern Stevedoring Company in the port of Toronto. Eastern Stevedoring was an independent company engaged in the loading of ships in Toronto harbour. All of its work was, therefore, in relation to ships and shipping companies which were federally regulated. The incumbent union representing the employees was the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees. It intervened and challenged the jurisdiction of this board to certify the employees of Eastern Stevedoring. When the Board decided that it had jurisdiction the Brotherhood applied to the Supreme Court of Ontario for an order quashing that decision and prohibiting the Board from taking further steps with regard to the certification. Because the application concerned the constitutional validity of the *Industrial Relations and Disputes Investigation Act* R.S.C. 1952, c. 152, the Attorney General of Canada, brought a reference to the Supreme Court of Canada to resolve the question of the jurisdictional validity of that statute.

29. The Supreme Court of Canada found that the federal statute was within the competence of Parliament. Having made that determination it was required to consider whether, because of their relationship to shipping, the company's employees worked "in connection with" navigation and shipping within the meaning of the federal labour legislation. The majority of the court responded in the affirmative, and in so doing established the principles

to be applied to determine whether an employer, which is not itself a federal work or undertaking, works sufficiently in connection with a federal undertaking that the industrial relations of its employees fall to be federally regulated.

30. In today's marketplace there are few areas of industry and commerce in which private employers will not have some degree of contact with a federally regulated business or undertaking. The issue, therefore, is where to draw the line. At what point does a private employer become so associated with a federal activity that its industrial relations pass from provincial to federal regulation? On this in the *Stevedoring* case, Kerwin, C.J.C. had the following to say (at 3 D.L.R. (2d) 730):

"It is not to be presumed that Parliament intended to exceed its powers. *Macleod v. A.G.N.S.W.*, [1891] A.C. 455 at 457; *Re Reciprocal Ins. Legislation*, [1924] 1 D.L.R. 789 at 801-2; [1924] A.C. 328 at 345-6; 41 C. C.C. 336 at 250-1, and, therefore, the Act before us should not be construed to apply to employees who are employed at remote stages, but only to those whose work is intimately connected with the work, undertaking or business."

31. In that case it was argued that the words "upon or in connection with" now embodied in section 108 of the *Canada Labour Code*, are so broad and pervasive that they would extend to any activity, however slim or remote its connection with a federal work, undertaking or business. In responding to that argument (at 3 D.L.R. 757) Estey, J. made the following statement, which has become the generally accepted test to determine whether an employer falls within those words:

"It may be conceded that in their widest import there is much in such a contention, but these words must be read and construed in association with the other language of the section and, indeed, with that of the Act as a whole. When so read I do not think they could be construed to include more than that which would form an integral part or be necessarily incidental to the work, undertaking or business that was within the legislative competence of Parliament."

The fact that an employer has a contract to provide services to a federal business or undertaking does not, of itself, necessarily bring that employer within the legislative competence of Parliament as regards its labour relations. The employer's business must be an integral part of the federal function in question.

32. As the *Stevedoring* case itself illustrates there is room for disagreement as to what is and is not a service that is an "integral part" of or "necessarily incidental" to a federal work or undertaking. The majority of the court found that all of the employees came under the federal statute. Locke J., in a partial dissent, concluded that its office employees, not being involved with the ship, came under provincial jurisdiction. Rand, J. also dissented in part. While finding that the federal act was *intra vires*, he could not agree with the majority that any part of the stevedoring and terminal service fell under federal jurisdiction. It was his view that they provided a purely local and therefore provincially regulated service. While the majority did not carve out the office workers as Locke, J. suggested, Rand, J. nevertheless expressed particular concern over the possibility of fragmenting the employees of

a business for industrial relations purposes. In a passage pertinent to the case before us, he said (at 3 D.L.R. 744):

“The legislative scope over Dominion undertakings extends clearly to all features of the ship. The requirements of structure and machinery are subject to special regulations. But the employees of the dock yard or of an engineering company employed generally in that work, because of being under an engagement to repair all ships of a Dominion line, would not thereby be brought under the Act. That local cost is one of the provincial conditions under which the vessel operates. Various needs of the undertakings call for services the furnishing of which has become specialized locally; and when unloading is performed by an independent organization, can a fractional portion of its employees be split off and annexed to Dominion labour control? A divided authority would become hopelessly confused as the employees were allocated to local or federal service. This is illustrated by analogous examples. Must be a general protective agency, because it serves banks, be treated in any degree in respect of labour relations as performing a service ancillary to banking. Would a general delivery service engaging with an express company to make local deliveries be drawn fractionally within the Dominion orbit? These considerations show that, from the standpoint of practicability, the entire organization must be taken to be under a single legislative control including such auxiliary staff such as office workers.”

33. The authorities confirm that the mere fact that an employer has a contract with a federal Crown corporation does not place it on a higher plane of consideration that if its contract was with a private company working in the federal sphere. In *Bachmeier, Diamond & Percussion Drilling Co. Ltd. v. Beaver Lodge District Of Mine, Mill and Smelter Workers, Local Union 913* (1962), 35 D.L.R. (2d) 241 (Sask. C.A.) an employer disputed a certification order of the Saskatchewan Labour Relations Board in respect of its employees involved in drilling work for a crown corporation involved in the producing, refining and treating of uranium and incorporated for that purpose under the *Atomic Energy Control Act*, R.S.C. 1952, c. 11. Culliton, Acting C.J.S., applying the test from *Eastern Stevedoring*, concluded: “There is nothing in the material to show that Diamond and Percussion Drilling being done by the applicant company is either an integral part of, or necessarily incidental to the producing, refining or treatment of uranium ore.”

34. A more recent and most instructive decision of the Supreme Court of Canada on the constitutional status of the employment relations of federally connected employers is *Montcalm Construction Inc. v. The Minimum Wage Commission*, 79 CLLC ¶14, 190. In that case the Quebec Minimum Wage Commission sought to recover on behalf of the employees of Montcalm Construction deficiencies in wages and other monetary items to which they would have been entitled under Quebec legislation. The employer argued that because the construction work in question was performed under contracts with the federal government on federal lands, in the building of Mirabel Airport, the legislation of the Province of Quebec regulating employment relations could have no application.

35. The Court concluded that the provincial law must apply. Having followed the approach of the Court in the *Eastern Stevedoring* case, Beetz, J. wrote, for the majority:

“In submitting that it should have been treated as a federal undertaking for the purposes of its labour relations while it was doing construction work on the runways of Mirabel, Montcalm postulates that the decisive factor to be taken into consideration is the one work which it happened to be constructing at the relevant time rather than the nature of its business as a going concern. What is implied, in other words, is that the nature of a construction undertaking varies with the character of each construction project or construction site or that there are as many construction undertakings as there are construction projects or construction sites. The consequences of such a proposition are far reaching and, in my view untenable: constitutional authority over the labour relations of the whole construction industry would vary with the character of each construction project. This would produce great confusion. For instance, a worker whose job is to pour cement would from day to day be shifted from federal to provincial jurisdiction for the purposes of union membership, certification, collective agreement and wages, because he poured cement one day on a runway and the other on a provincial highway. I cannot be persuaded that the constitution was meant to apply in such a disintegrating fashion.

To accept Montcalm’s submission would be to disregard the elements of continuity which are to be found in construction undertakings and to focus on casual or temporary factors, contrary to the *Agence Maritime and Letter Carriers’* decisions. Building contractors and their employees frequently work successfully and simultaneously on several projects which have little or nothing in common. They may be doing construction work on a runway, on a highway, on sidewalks, on a yard, for the public sector, federal or provincial, or the private sector. One does not say of them that they are in the business of building runways because for a while they happen to be building a runway and that they enter into the business of building highways because they thereafter begin to do construction work on a section of a provincial turnpike. Their ordinary business is the business of building. What they build is accidental. And there is nothing specifically federal about their ordinary business.”

36. While we are, of course, not concerned in this case with a construction company, it appears to the Board that the foregoing passage is pertinent to the “federal connection” aspect of the respondent’s argument. The respondent maintains that its contracts with the federal airport authorities and the railway bring it within federal jurisdiction. But surely to focus on those aspects of its business, leaving aside the separate question of its extraprovincial traffic, is to emphasize casual factors in a way that distorts the true picture of Veteran Taxi’s business. In the *Stevedoring* case the employer devoted one hundred percent of its work to the service of a federal undertaking. In those circumstances the majority of the Court could clearly conclude that its activities were an integral part of and necessarily incidental to the business of the steamship lines that it serviced. In the instant case Veteran Taxi did not adduce evidence to establish what percentage of its business is derived from the airport and railway station. It is clear, however, that it is a very small percentage. Even if it is assumed, at the outside, that it could be as much as ten percent of Veteran Taxi’s business, that would not change its essential character – which is the business of a local taxi company servicing the City of Windsor.

37. Does Veteran Taxi by its limousine service at the airport and the railway station and its agreement to transfer mail for CN perform work that is an integral part or necessarily incidental to the operation of aviation, railways and the national postal service? On the evidence before us we must find that the services of the taxi company at these locations are ancillary and incidental to the federal undertakings involved. The respondent does not provide a service that is necessary and integral to those federal undertakings.

38. Two court decisions in cases similar to the instant case support the Board's conclusion in this regard. In *Murray Hill Limousine Service Ltd. v. Sinclair Batson*, 66 CLLC ¶14,143 the Quebec Court of Queen's Bench held that the operations of baggage porters who serviced airline passengers up to the time their baggage was given to the airline prior to departure and immediately after the baggage was returned by the airline after landing, were not an integral part of airline transportation. The court concluded that the labour relations of those employees was within the constitutional competence of the province. More to the point, the Ontario High Court in *Re Colonial Coach Lines Ltd. and Ontario Highway Transport Board* (1967), 62 D.L.R. (2d) 217 found that ground transportation services provided to airline passengers to and from the Toronto Airport are provincially regulated. In concluding that the Limousine service was not an integral part of the function of aviation Donohue, J. described (at p. 276) the work performed by the company:

“Air Terminal Transport Ltd's Service is no doubt a convenience to the public in going to and from the airport but it is without doubt the case that the airport could continue to function without the service of Air Terminal Transport Ltd.”

39. The distinction between the service being a “convenience” associated with the federal undertaking and a service being “an integral part of” a federal undertaking was followed and applied by this Board in its decision in *North Shore Supply Co. Ltd.*, [1974] OLRB Rep. July 446. In that case the respondent, a subsidiary of Canada Steamship Lines Ltd., operated out of Thunder Bay as a ship chandler, providing ships with provisions such as food, hardware and equipment necessary for their day to day operations. Applying the test in the *Eastern Stevedoring* case as well as the *Murray Hill Limousine* and *Colonial Coach Lines* decisions, the Board concluded that the employer provided a service which was essentially a convenience to shipping operations. It did not thereby become an integral part of the activity of shipping itself.

40. Applying the foregoing authorities, the Board cannot conclude that Veteran Taxi is an integral part of aviation, railroading and the postal service. The fact is that it has made contracts with the Department of Transport and Canadian National Railways to make itself available for the convenience of their passengers, and nothing more. Like the operation of a newsstand, coffee shop or parking lot, the respondent's taxi stands at the airport and railway station are a convenience and not an integral part of air and rail transportation. (*Toronto Auto Parks (Airport) Limited*, [1978] OLRB Rep. July 682). Its agreement to do a daily mail transfer from Windsor-Walkerville is a commercial convenience in furtherance of CN's postal contracts. When the extent of Veteran Taxi's postal activity is compared with that of the employer in *The Letter Carriers' Union of Canada v. Canadian Union of Postal Workers* [1975] 1 S.C.R. 178, 73 CLLC ¶14,190, its involvement is marginal and far from being integral or necessarily incidental to the functioning of the Canadian postal service.

41. For the foregoing reasons the Board finds that Veteran Taxi does not operate "in connection with a federal work, business or undertaking" within the meaning of section 108 of the *Canada Labour Code*.

42. We turn to consider the second issue, namely whether Veteran Taxi is itself a work or undertaking extending beyond the limits of the province within the meaning of section 92(10)(a) of the B.N.A. Act, or, put differently, whether it is a federal work, undertaking or business within the meaning of section 108 of the *Canada Labour Code*. Does the respondent's business, taken as a whole, and having regard to the fact that it makes trips across the border into the United States, bring it within federal jurisdiction for the regulation of its labour relations?

43. Veteran Taxi submits that no matter how small its extra-provincial business may be as a percentage of its overall business it must be characterized as a federal undertaking because it crosses the border in the course of its business on a regular basis. Given the similarity of Veteran Taxi's service to that provided by cab companies in the cities and towns of Ontario along the Ottawa and St. Lawrence rivers as well as at and near the border points of the Great Lakes, the respondent's argument has far-reaching consequences for the constitutional regulation of labour relations in much of the taxi industry in this province. The union has voiced its concern that the constitutional jurisdiction over cab companies in the province in respect of employment, including minimum wages and the regulation of labour relations, should not be split between federal and provincial law, varying with a taxi companies' proximity to the borders of the province. It submits that taxi operations by their very nature are essentially local and provincial in nature. It maintains that a local taxi service should not be subject to federal regulation when a numerically insignificant proportion of its business is extra-provincial.

44. The facts bearing on this aspect of the application are not in substantial dispute, but they bear reviewing. Ninety-eight percent of Veteran Taxi's business is conducted entirely in Ontario, in and around the City of Windsor. Some two percent of its trips take it across the border. The respondent's drivers are not required to accept trips to Detroit, and the evidence establishes that approximately half of them do not.

45. Any service to Detroit provided by Veteran Taxi is on a demand basis. In other words, with the possible exception of the railway mail transfer, none of the respondent's trips to Detroit are on a regular basis analogous to a bus schedule. Veteran Taxi's Airline Limousine will not go to Detroit if no airport passenger presents himself and requests that service. There are no regularly scheduled limousine trips. Similarly the two limousines connecting to the Amtrack Station in Detroit will not go there unless a passenger disembarking from a train so requests. The evidence establishes that it is not uncommon for there to be no takers for either the airport or the railway limousine to Detroit. The respondent's limousine service is in reality not qualitatively different from its general dispatch service to the public: it is another means, though obviously more advantageous than the yellow pages, of being available.

46. The airport limousine service does not tour the downtown Detroit hotels to collect passengers for transportation to the Windsor Airport the way it does in Windsor. Similarly, on those occasions when a passenger does ask the railway station limousine to take him to a destination in Detroit, be it the Amtrack station, a hotel, or any other destination,

it does not collect passengers for the return trip. On the whole, therefore, Veteran Taxi does not operate in any way analogous to a two-way international carrier. Its trips across the border are not on a timetable and it has no return passenger service, save the pick up of occasional passengers at the Detroit tunnel waiting room. And, while its Chrysler Account trips are generally performed for the same commercial clients, they too are on an *ad hoc*, demand basis.

47. It is convenient at this point to consider whether the provincial and extra-provincial components of Veteran's taxi's business are severable. When the extra-provincial portion of a employer's business is functionally separate from its intra-provincial activity the labour relations of the intra-provincial business may fall separately within provincial jurisdiction. (*C.P.R. v. The Attorney General of British Columbia*, [1950] 1 D.L.R. 721 (J.C.P.C.)). The respondent submits that the extra-provincial and intra-provincial activities of Veteran Taxi are integrated and that, realistically, there can be no severance of these two aspects of its business for industrial relations purposes.

48. The evidence pertinent to this issue establishes that a driver working for Veteran Taxi will make 140 to 150 trips in a normal week. One or two of those will involve a request for service to Detroit. A driver may collect a Detroit passenger at the airport, at the railway station, or at a home or business through the company's telephone dispatch service. He might also obtain a Detroit fare from a passenger off the street or he may be sent to Detroit on a Chrysler Account call. Apart, therefore, from the fact that some drivers refuse to go to Detroit at all, there is no ready line of demarcation between employees who work on extra-provincial runs and those who do not. While it is true that the same limousines service the airport and railway station on a regular basis, for practical purposes the drivers of those vehicles are in no different position than any other. If any of the respondent's drivers go to Detroit they do so on an irregular and casual basis depending entirely on customers' requests. Given that reality, for the reasons expressed by Rand J. in the *Eastern Stevedoring* case and reiterated by Beetz J. in the *Montcalm Construction* case, it would be impractical and highly undesirable to fragment the respondent's employees for the purposes of regulating their employment relations. The Board agrees with the respondent that the business of Veteran Taxi must, for labour relations purposes, be characterized as a single enterprise with fully integrated intra-provincial and extra-provincial services. Where the undertaking is integrated, as we find this one to be, there can be no justification for divided jurisdiction. The labour relations of the employees concerned must be regulated either by the province or by the federal government in their entirety (see *A.G. Ontario v. Winner*, *supra*, per Lord Porter, at 4 D.L.R. 679).

49. The constitutional jurisdiction of a provincial authority over an employer involved in inter-provincial or international carriage has been the subject of a number of court decisions: (*A.G. Ontario v. Winner*, *supra*; *Re Tank Truck Transport Ltd.*, [1960] O.R. 497; 25 D.L.R. (2d) 161 (H.Ct.); *Sub nom. R.v. The Toronto Magistrates, Ex.p. Tank Truck Transport Ltd.*; Affirmed on appeal, [1963] 1 O.R. 272; 36 D.L.R. (2d) 636, (C.A.); *R.v. Cooksville Magistrates Court, Ex.p. Liquid Cargo Lines Ltd.*; [1965] 1 O.R. 84; 46 D.L.R. (2d) 700, (H. Ct.); *Regina v. Manitoba Labour Board ex parte Invictus Ltd.*, (1968), 65 D.L.R. (2d) 514 (Q.B.) and *Pacific Produce Delivery v. Labour Relations Board of B.C.*, [1974] 3 W.W.R. 389 (B.C. Court of Appeal)).

50. If Veteran Taxi is a federal work or undertaking within the meaning of section

92(10)(a) of the B.N.A. Act it must be so because its service extends beyond the limits of the province. The *Winner* case, *supra*, is the most authoritative statement of the courts on the principles to be applied in characterizing inter-connecting undertakings. In that case Winner's company ran a bus service between Massachusetts and Nova Scotia. His buses passed through New Brunswick, but the New Brunswick license by which he was regulated did not allow Winner to take on or deposit passengers within the province. Winner did, and an injunction was sought by a competitor to prevent Winner from violating his license. That raised the issue of whether the Province of New Brunswick had constitutional authority to issue a license covering Winner in that situation. The Judicial Committee of the Privy Council concluded that it did not. While that decision has been criticized as being unresponsive to the realities of Canadian transportation (see e.g. Whyte and Lederman, *Canadian Constitutional Law* (Toronto, 1975) at 492), it established the tests that have been applied by the courts in determining whether a transportation business is a connecting undertaking.

51. The Privy Council rejected the conclusion of the Supreme Court of Canada that Winner's business had an incidental intra-provincial component which could be lawfully regulated by the Province of New Brunswick. The Judicial Committee viewed Winner's business as a single, indivisible enterprise which must be seen as an inter-connecting activity in its entirety. In dealing with the problem of characterization, Lord Porter, for the Committee, addressed his mind to the possibility that a carrier might attempt, fraudulently, to put himself out of provincial jurisdiction by incorporating a short run over the border into his business as a subterfuge. There is no suggestion of any fraud in the case before this Board. Bearing in mind however that a judicial decision, and especially an observation made *obiter*, should not be read as narrowly as a statute, it is worth recalling the following passage of Lord Porter (at 4 D.L.R. 680):

"Just as the question whether there is an inter-connecting undertaking is one depending on all the circumstances of the case, so the question whether it is a camouflaged local undertaking masquerading as an inter-connecting one, must also depend on the facts of each case and on the determination of what is the pith and substance of an Act or Regulation."

The union submits that in this case Veteran Taxi is attempting to exaggerate a few threads of extra-provincial activity into an all encompassing federal cloak that hides and distorts its true identity as an essentially provincial activity.

52. In the trucking industry the courts have had occasion to consider what degree of extra-provincial activity will bring a carrier's business under federal jurisdiction. In *Re Rank Truck Transport Ltd.* [1963] 1 O.R. 272; 36 D.L.R. (2d) 636 (H. Ct.) a long distance trucking firm transported goods within Ontario, between Ontario and Quebec and into the United States. Approximately six percent of its total business consisted of the carriage of goods outside the province. The court found that the industrial relations of Tank Truck Transport Ltd. were outside the jurisdiction of the province by virtue of the inter-connecting nature of its business. In so concluding the court specifically rejected the argument that reference could be had to the relative percentages of intra-provincial and extra-provincial traffic to characterize the trucking business as provincial or federal for labour relations purposes. Following the approach taken in the *Winner* case, the court found that the employer's transportation activity was one and indivisible, and concluded that if any part of its business

is extra-provincial the legislative jurisdiction of the province is ousted. In so concluding, however, MacLennan, J. made the following observation:

“... not every undertaking capable of connecting provinces or capable of extending beyond the limits of a province does so in fact. The words ‘connecting’ and ‘extending’ in section 92(10)(a) must be given some significance. For example, a trucking company taking goods or passengers occasionally and at irregular intervals from one province to another could hardly be said to be an undertaking falling within the exception in section 92(10)(a).”

Those remarks are obviously *obiter*. But while the court did not have before it the facts before us in this application, nor the benefit of the judgment of the Supreme Court of Canada in *Montcalm Construction Ltd.*, *supra*, it clearly entertained the possibility that different considerations apply to a local taxicab company whose business provides services across a provincial boundary on a casual basis. Reading that part of MacLennan, J.’s decision, together with the decision of the Supreme Court of Canada in *Montcalm* the Board must ask itself, viewing the respondent’s business as a whole, whether its extra-provincial trips are merely incidental and ancillary to its main enterprise as a municipal taxi company. In determining whether Veteran Taxi is a federal undertaking this board must have regard to the realities of the case, bearing in mind the test set out by the Supreme Court of Canada in the *Montcalm Construction* case and, in particular, the following passage from the judgment of Beetz, J:

“The question whether an undertaking, service or business is a federal one, depends on the nature of its operation; Pigeon, J. in *Canada Labour Relations Board, Public Service Alliance of Canada v. City of Yellowknife*, [1977] 2 S.C.R. 729; 77 CLLC ¶14,073, at S.C.R. 736. But, in order to determine the nature of the operation, one must look at the normal or habitual activities of the business as those of ‘a going concern’, (Martland, J. in the *Bell Telephone Minimum Wage* case at p. 772) without regard for exceptional or casual factors; otherwise, the constitution could not be applied with any degree of continuity and regularity; *Agence Maritime Inc. v. Conseil Canadien des Relations Ouvrières*, [1969] S.C.R. 851 (*the Agence Maritime* case); the *Letter Carriers’* case.

53. That is the approach which was taken by the Manitoba Court of Queen’s Bench in *Invictus Ltd. v. Manitoba Labour Board*, (1967), 62 W.W.R. 150, 65 D.L.R. (2d) 514. In that case a company was in the business of transporting general freight and horses within Manitoba. It also held a federal carrier’s license and carried on extra-provincial business in response to requests, with profits from that aspect of its business amounting to some five-and-a-half percent of its gross profits. A union representing its employees was certified under the Manitoba Labour Relations Act. The employer moved on *certiorari* to quash the decision on the basis that the Board was without jurisdiction because the company fell within section 92(10)(a) of the B.N.A. Act. Matas, J. recognized that the *Tank Truck* case represented the first application on the principles expounded in the *Winner* case to matters of labour relations. He considered as well the decision of the Ontario High Court in *Regina v. Cooksville Magistrates Court ex. parte Liquid Cargo Lines Ltd.*, (1964), 46 D.L.R. (2d) 700.

Both of those decisions found that a carrier's extra-provincial traffic must be "regular and continuous" for its labour relations to fall under federal jurisdiction.

54. The employer in *Invictus* held the same kind of extra-provincial transport license as Veteran Taxi does in this case. On that aspect of the evidence the Court made the following comment, with which we agree:

"In my opinion this license in itself would not constitute the applicant an inter-provincial carrier within the meaning of the relevant legislation. It is not what a company is authorized to do but what it actually does which will govern the determination of the jurisdiction under which it falls."

In *Invictus* the extra-provincial business was, in the words of the Court, "casual". Trips outside Manitoba were undertaken in response to requests and the company always held itself out to the public as being available for such trips. The Court then went on to consider whether these facts established an inter-connecting business on a "regular and continuous" basis within the meaning of the *Tank Truck* case:

"To consider the applicant's extra-provincial business as 'regular and continuous' would be stretching the meaning of those words unreasonably. In constitutional cases no less than in other cases coming before the courts, it is necessary that the realities of the situation be assessed. The operations of the applicant, when examined from a practical aspect, are in pith and substance provincial in character. The applicant's extra-provincial transport of horses is incidental to what is essentially and basically and intra-provincial business.

The Court concluded that the company's extra-provincial traffic did not constitute an extending or connecting link such as contemplated by section 92(10)(a) of the B.N.A. Act, and found that its business fell within the jurisdiction of provincial labour relations legislation.

55. The foregoing cases establish the principles that the Board must apply to the facts in this case. The respondent submits that the decisions of the Courts in *Tank Truck* and *Invictus* cannot be reconciled, and that the Board must narrowly apply the reasoning in *Tank Truck*. According to the respondent we are bound to conclude that, by virtue of the two percent of the respondent's extra-provincial taxi business, it must be characterized as an extending or connecting link within the meaning of section 92(10)(a) of the B.N.A. Act and be found to be outside the Board's jurisdiction.

56. We do not agree that the *Tank Truck* and *Invictus* cases are necessarily in conflict as they apply to the case before us. The Court in *Tank Truck* made specific reference to taxicab companies. In an *obiter* comment it indicated that a "taxicab company taking goods or passengers occasionally and at irregular intervals from one province to another could hardly be said to be an undertaking falling within the exception in section 92(10)(a)". Given the irregular and occasional nature of the respondent's trips out of Ontario, the Board is persuaded that the Court may well have been contemplating just such a business as the respondent.

57. Certainly, applying the words of the Court, if Veteran Taxi is viewed from the standpoint of the average employee, extra-provincial trips are manifestly occasional and irregular. On the evidence before the Board a driver will carry some fifty passengers in a row locally in Windsor before he is asked to make a trip to Detroit. He may then have another fifty Windsor fares before a similar request is made. Or he may go through a hundred Windsor customers and then receive three requests for Detroit all in a row. Assuming he is among the fifty percent of the drivers who agree to drive to Detroit, over a two-week period he might have four requests for Detroit in one week and none at all in the next. But during the same two weeks he will have had some three hundred trips in the City of Windsor. Surely his extra-provincial work must be regarded as coming occasionally and at irregular intervals, within the meaning of the *obiter* passage in the *Tank Truck* case.

58. Counsel for Veteran Taxi submits that the Board should give considerable weight to the absolute number of border crossings made by its fleet of 132 cabs, rather than emphasize percentages. In our view it is not helpful to focus on the absolute number of border crossing that Veteran Taxi's fleet of cabs might make in a given day or week. That kind of analysis would lead to a distorted and uneven application of the constitutional law as between large companies such as the respondent's and small cab companies in the same locality. If the respondent crosses over to Detroit thirty times a day, is it to be federally regulated while a much smaller company, with two crossings a week – but having the same percentage of Detroit business – is to be provincially regulated? If that were so different minimum wages and labour codes would apply to large and small taxi companies. Surely a result as disintegrating as that could not have been contemplated or intended by the draftsmen of Confederation. In our view percentages can be the only consistent bench-mark in assessing the true nature of any business with a connecting link.

59. Moreover, we are satisfied that the Court in *Tank Truck* did not intend the words “regular and continuous” to be mechanically and rigidly interpreted without regard to the realities of each particular case. We are fortified in that view by the following example. Suppose a small, six-cab taxi company operating in the City of Ottawa. It makes two hundred passenger trips per day. All of its daily trips are on the Ontario side of the Ottawa River, save one. By a pre-arranged contact it makes one trip daily to the City of Hull to collect and transport a student to a school in the City of Ottawa. This it does on a “continuous” and “regular” basis. Is it to be supposed that this one daily trip must qualify that taxi business as a federal undertaking, whose industrial relations fall to be regulated along with those of railways and airlines? And if the Hull contract is cancelled, will the Ottawa cab company then revert to the provincial sphere and be governed by different minimum wage laws and a different Labour Relations Act? Whatever may be the law for the trucking industry or buses, we do not believe that this is what the Court would have contemplated by the choice of its words in its *obiter* passage on taxicabs in the *Tank Truck* case.

60. Even if we are wrong in this regard, and there is some irreconcilable conflict between the approach taken in *Tank Truck* and the approach taken in *Invictus*, we feel that we are bound, after the decision of the Supreme Court of Canada in *Montcalm Construction Ltd.* to follow the approach enunciated by Beetz, J. for the majority and clearly taken by the Court in *Invictus*. The Board must, to use the words of the Supreme Court of Canada, look to the nature of the respondent's operations. It must look at the normal, or habitual, activities of Veteran Taxi viewed as a “going concern” and avoid any distorted conclusion that would flow from giving undue weight and regard to the exceptional factor of the runs to Detroit that amount to two percent of its business, that is provincial in character.

61. In summary, by all of the above standards the business of Veteran Taxi is, in pith and substance, a local business. It is dedicated to the transportation of passengers in the City of Windsor and its vicinity. The fact that its employees may carry passengers of light freight across the adjacent border on an occasional and casual basis does not alter its basic character as a local taxi company. Its marginal involvement with extra-provincial traffic is purely incidental and ancillary to its main function as a municipal service. When the realities of the situation are assessed and the business of Veteran Taxi is examined in an unexaggerated and practical way, the whole of its operation is, in pith and substance, provincial in character. Any service it provides beyond the provincial boundary is incidental to that essential character. To conclude otherwise is to distort the reality.

62. For the foregoing reasons the Board finds that Veteran Taxi is not a federal undertaking within the meaning of section 92(10)(a) of the B.N.A. Act or section 108 of the *Canada Labour Code*. This Board therefore has jurisdiction to entertain this application.

63. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

64. The Board further finds that all dispatchers and telephone order takers of the respondent in Windsor, save and except supervisors, persons above the rank of supervisor and persons employed for not more than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

65. The union submits that that by virtue of certain breaches of the Act which it alleges the respondent has committed it should be granted certification pursuant to section 7a of the Act. That section provides as follows:

“Where an employer or employers’ organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers’ organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.”

66. The list of allegations against the respondent employer is long. Some of the allegations relate to events which occurred after the terminal date of this application. The terminal date is the last day on which the union may file evidence of its membership support for the purpose of this application. Events after the terminal date cannot, therefore, be looked to as acts of the employer that chilled the union’s organizing campaign. They are, however, relevant to the Board’s consideration of whether the employees have been deprived of the ability to express their wishes in a representation vote that might be conducted after any breaches of the Act occurred.

67. At the Board’s second hearing, after it gave its ruling on the constitutional issue, and after the parties indicated that they did not object to the substitution of one member of the Board, the respondent indicated that it intended to challenge the Board’s jurisdiction in

the courts. On that basis it requested an adjournment of this application, as well as the two other applications for certification and the unfair labour practice complaints which the Board was hearing concurrently. The Board concluded that the possibility of an indefinite postponement of the employees' rights during the course of judicial review did not justify suspending the Board's proceedings. It therefore declined the request for an adjournment. (*R v. O.L.R.B., ex parte Nick Masney Hotels Ltd.*, [1970] 3 O.R. 461 (C.A.) per Laskin, J.A. at 465; *Re Cedarvale Tree Services Ltd.*, [1971] 3 O.R. 832 (C.A.) per Arnup, J.A. at 841.)

68. Following the Board's denial of the adjournment, counsel for the respondent objected to the Board's ruling and informed the Board that Veteran Taxi was then withdrawing from the proceedings.

69. The respondent having withdrawn, there was no reply to the section 79 allegations filed against it. The allegations in the section 79 complaints are the basis of the union's section 7a application. Without detailing the extensive particularity of the allegations, they maintain that the employer engaged in a course of conduct which, if proved, would be in breach of sections 56, 58 and 61 of *The Labour Relations Act* and which, in the Board's opinion, would be such that the true wishes of the employees would not likely be ascertained.

70. When a complaint is filed under section 79, subsection 79(4a) of that section applies. It provides:

"On an inquiry by the Board into a complaint under subsection 4 that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization."

71. When an employer against whom an allegation is made under section 79 of the Act fails to adduce any evidence to rebut the charges against it, given that the burden of proof is upon the employer, those charges must be taken as proved. (*I.C.B. Warehousing Division of Alan-Anson*, [1976] OLRB Rep. Oct. 621). The complainant must, of course, adduce evidence respecting the nature and extent of damages suffered if the Board is to make any order as to remedy, particularly in relation to compensation. That was done in the section 79 complaints against the respondent.

72. The breaches of the Act by the respondent were therefore established for the purposes of this application. The Board is satisfied that in light of the respondent's conduct as alleged the true wishes of the employees are not likely to be ascertained. Given that the applicant union has membership support adequate for the purposes of collective bargaining, the Board stated at the hearing that it was granting interim certification to the applicant in respect of the bargaining unit pursuant to section 7a of the Act.

73. The Board's disposition of the section 7a application rendered academic any inquiry into the statement of objection filed by the group of employees represented by Mr. Heeney and Mr. Caverhill. The petition, even if it were proved to be voluntary, would not

numerically reduce the union's membership strength by numbers that would alter the Board's view of the extent of support the applicant enjoys for the purposes of its certification under section 7a.

74. Mr. Heeney and Mr. Caverhill still have an interest in the proceedings. They and the union are disagreed as to their employment status as well as that of others who may or may not be included in the bargaining unit. The Board advised Mr. Heeney and Mr. Caverhill that they were entitled to retain counsel and to fully participate in the proceedings respecting the only issue outstanding – the final composition of the bargaining unit. The Registrar is therefore instructed to give them notice of all future proceedings of the Board in respect of this application.

75. Mr. N. Wilson and Mr. A. Vigar, Labour Relations Officers are hereby appointed to inquire and report back to the Board on the list and composition of the bargaining unit herein.

DECISION OF BOARD MEMBER W. G. DONNELLY:

1. While I would agree with the majority on the disposition of the section 7a application, I cannot agree with the decision of my colleagues on the Board's constitutional jurisdiction to entertain this application. I must dissent from the decision of the majority of the Board on the following grounds:

- a) The number of taxis dispatched to Detroit was variously described as being from 1 to 2% of the daily trips booked through the dispatchers to up to a maximum of 5% by the witnesses called. The main witness for the applicant, Mr. A. D. Pilecki, testified that his estimate of 1 to 2% of such calls was based on the number of customers who identified trans-border points as their destinations. Not all callers volunteered such information and, of course, cabs can be "flagged" on the streets and ordered to Detroit. His estimate therefore must be looked on as being conservative.

However, it is obvious that the trans-border taxi trips do not represent a large percentage of the total daily taxi runs but in absolute terms, applying 1½% to the estimated 3,000 to 3,500 daily runs, the figure of 45 to 52 such runs per day, which had been so identified with the dispatchers, is obtained.

- b) Other Veteran Cab services, the nature of which are described in various paragraphs of the majority decision – I will not burden this text by repeating them here – are extensive obligations assumed by the cab company to provide trans-border service on a regular, daily basis.

2. In addition to making some 50 or more runs daily to Detroit via its "phone-in" service, Veteran Cab provides, by contract, broad passenger and mail services from the Airport and Railway Station to Detroit and when one adds to this the so-called "Chrysler Contract", which the witness, Mr. Pilecki, stated amounted to 2 to 3 trips per day, the breadth

and depth of its total obligations to provide international service, on a daily basis, become apparent.

3. I have therefore concluded that the view of the majority of the Board that the Veteran Cab Company is a simple taxi company servicing the City of Windsor, which occasionally carries passengers and mail across the border, is not tenable in view of all the circumstances. In consequence, I submit that this case falls within the ambit of the Canada Labour Relations Board and that the Ontario Labour Relations Board lacks jurisdiction.

4. As the Board, by majority decision, assumed jurisdiction and the hearing on the Section 7a application was then concluded *ex parte*, I concurred in the Board's findings in this instance subject always to my dissent concerning the Board's constitutional jurisdiction to entertain this complaint.

1501-79-R International Association of Bridge, Structural and Ornamental Ironworkers, Local 834, Applicant, v. York Steel Construction Limited, Respondent.

Appropriateness – Bargaining Unit – Certification – Employer operating at two locations within municipality – Whether single location units or municipal wide unit appropriate – Relevant criteria considered

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members E. C. Went and W. F. Rutherford.

APPEARANCES: *Maurice A. Green for the applicant; D. L. Brisbin for the respondent.*

DECISION OF THE BOARD; February 25, 1980

1. This is the continuation of an application for certification.

2. The respondent, York Steel Construction Limited, operates two plants in Metropolitan Toronto, the Fabrication & Erection Division located at 75 Ingram Drive in Toronto and the Wire Mesh Division located at 949 Wilson Avenue in Toronto. These plants are located approximately two miles apart. The Ingram Drive plant employs approximately 157 production employees, and the Wilson Avenue plant approximately 15.

3. In its application the union sought bargaining rights only for the employees at the Ingram Drive plant (the larger plant). The company, however, took the position that the single plant was inappropriate as a bargaining unit, and that a unit encompassing both plants in Metropolitan Toronto was the only appropriate one. As the applicant had requested a pre-hearing representation vote, the issue was not determined by the Board at that time, but rather, the Board directed that the representation vote proceed, with the ballots from the Wilson Avenue employees being segregated and sealed.

4. The vote did proceed on November 30, 1979. The ballots were counted for the Ingram Drive employees, and the applicant union was successful by a sufficiently wide majority (23) that it was assured of obtaining bargaining rights for both plants no matter how the employees at Wilson Avenue had voted.

5. The parties then returned to the Board and reversed their positions. The union now takes the position that the appropriate bargaining unit is undoubtedly the one encompassing both plants in Metropolitan Toronto, while the employer is just as certain that the Ingram Drive plant alone constitutes the proper unit. Both parties rely on the Board's decision in *Usarco Limited*, [1967] OLRB Rep. Sept. 526, and the cases following, in support of their position. They have produced an agreed Statement of Facts, on the basis of which the Board is requested to make its ruling. That agreed Statement is as follows:

"1. ... The General Manager, Mr. Harry Shephard, is in charge of the Wire Mesh Division, and reports directly to Mr. Joe Tanenbaum, President of York Steel Construction Limited.

2. The Wire Mesh Division manufactures wire mesh for various purposes. The Fabrication & Erection Division manufactures structural steel, steel grading, siding, boilers and tanks, and reinforcing rods.

3. The Wire Mesh Division uses no skilled labour but rather labourers and machine operators who are hired and trained exclusively at the Wilson Avenue location by Mr. Harry Shephard. The Fabrication & Erection Division also uses labourers but in addition, approximately 50% of the work force is comprised of skilled workers including welders and fitters.

4. There is no common hiring practice. Employees seeking employment at the Wire Mesh Division would apply there and be interviewed and hired there by Mr. Harry Shephard. Persons seeking employment with the Fabricating & Erection Division would apply for employment at that Plant and be interviewed and hired exclusively by the Personnel Department there.

5. There is no interchange of employees or supervisory staff between the Wire Mesh Division and the Fabrication & Erection Division. The supervisory staff at each location have no authority at the other location.

6. The Wire Mesh Division purchases its own raw materials from the supplier of its choice and that raw material comprises wire rod. The Fabrication & Erection Division buys its own raw material from the supplier of its choice and that raw material comprises structural steel.

7. The competitors of the Wire Mesh Division are almost exclusively located outside of the Toronto-Hamilton Region in smaller centres throughout Ontario. The competitors for the Fabrication & Erection Division are almost exclusively located in the Toronto-Hamilton Region.

8. The Wire Mesh Division handles its own sales function separately and exclusively, selling to distributors, manufacturers and also direct to construc-

tion companies. The Fabrication & Erection Division does not sell wire mesh. It is in the business of selling the products listed in paragraph 2. For this purpose, it has an Order Desk Clerk to handle off-the-street business and an estimating Department consisting of 8 to 10 employees to put together quotations for larger projects.

9. The Wire Mesh Division handles its own vacation scheduling. For the last 4 or 5 years it has shut down over the Christmas period for approximately 10 days. The Fabrication & Erection Division handles its vacation scheduling separately and has not had this Christmas shut down.

10. The Wire Mesh Division has complete discretion with respect to the pricing of its product. It also has complete discretion in the ordering of raw materials and other supplies needed for that business.

11. The office staff of the Fabrication & Erection Division handles the following administrative functions for the Wire Mesh Division: payroll, credit checks, accounts receivable and accounts payable.”

6. The Board in *Wix Corp. Ltd.*, [1975] OLRB Rep. Aug. 637 canvassed in some detail the Board’s practice with respect to defining geographic limitations in the appropriate bargaining unit. Apart from the construction and perhaps certain service industries, the Board’s policy, where the employer has employees at only one location within a municipal area, is to describe the bargaining unit in terms of the municipality itself (*Perimeter Industries Limited*, [1973] OLRB Rep. March 174). On occasion the Board will expand its definition of the bargaining unit to encompass an area greater than a single municipality (see *The Board of Health of the York-Oshawa District Health Unit*, [1969] OLRB Rep. Feb. 1178; *The Adams Furniture Company Limited*, [1975] OLRB Rep. June 491; and note as well the Board’s normal unit of “the Municipality of Metropolitan Toronto”), but is reluctant to do so in the absence of compelling reasons (*Wittich’s Bread Limited*, [1969] OLRB Rep. Jan. 1019; *Del Zotto*, [1972] OLRB Rep. June 637 and *Canada Safeway Limited*, [1972] OLRB Rep. Mar. 262). The primary reason for this policy of municipality-wide bargaining units is the Board’s concern for stability of bargaining rights; i.e., the union’s bargaining rights will not be affected by a subsequent move of the employer’s operation to some other location within the same municipality. On the other hand, actual accretions to the employer’s operations within the municipality, such as a second or third plant, will automatically be covered by the union’s certificate. To this latter extent, the right of self-determination of a bargaining agent by the employees at these new locations is compromised, in favour of the over-riding concern for stability of bargaining rights.

7. Where, however, the employer at the time of an application for certification *already* has employees at more than one location within the municipality, the competing principles, apart from stability of bargaining rights, become the right of the various groups of employees to self-determination versus the importance of establishing a bargaining constituency that will lead to a viable bargaining relationship. In *The Adams Furniture Company Limited* case, *supra*, the Board examined this problem in the context of a proposed bargaining unit comprised of all of the constituent municipalities of the Regional Municipality of Niagara and Dunnville, and had this to say:

“8. There is the possibility that regional bargaining units may interfere with the right of self-organization by sweeping into the bargaining units employees who either do not wish to be organized or wish to be organized by some other bargaining agent. It should be recognized, however, that this threat to the right of self-organization may be no greater than that posed by the industrial unit at a single plant or a multi-location unit within a municipality. Whenever the Board makes a determination as to appropriateness, there is always the possibility that groups of employees who do not support the applicant will be swept into the unit. Although it can be argued that such a determination interferes with the right to self-organization, it is justified by the requirement that the Board determine a bargaining constituency that will lead to a viable bargaining relationship. . . .

9. In determining whether a bargaining unit is viable, the primary consideration is the community of interest among the employees. Where a community of interest is lacking, there is the distinct possibility that the bargaining agent will not be able to reconcile the disparate interest groups within the unit. If the bargaining agent is not able to represent effectively all groups within the unit, there is a good chance that this will affect the availability of the collective bargaining relationship itself. Community of interest is determined by the consideration of a number of factors and undue significance should not be attached to any one of them. Geographic separation of employees is one of these factors, but as the Board has indicated in the *Usarco* case, [1967] OLRB Rep. Sept. 526 there are a number of other factors of equal importance. These are: 1) nature of work performed; 2) conditions of employment; 3) skills of employees; 4) administration; 5) functional coherence and interdependence. When the Board is determining the appropriateness of a regional bargaining unit, all of these factors must be considered.”

Besides the “community of interest” test, the *Usarco* case also mentioned as possible factors: centralization of managerial authority, economic impact (i.e. the impact which the carving out of separate bargaining units is likely to have on the employer’s normal manner of carrying on business), and source of work. Other cases, in addition, have mentioned the history of bargaining units in a particular type of operation, as well as the desire of the parties as further factors. See *The Gypsum Company Limited*, [1967] OLRB Rep. July 345, and, especially on the latter point, *Ponderosa Steak House*, [1975] OLRB Rep. Jan. 7 and *McDonald’s Restaurants*, [1974] OLRB Rep. Oct. 755. As was stated in the *Usarco* case (p. 530), “the factors considered . . . are not of equal importance and no single factor is necessarily crucial to the disposition of the case.” In each case which comes before it the Board must weigh the various competing factors and interests involved. There are exceptions to this approach as well, but these have been limited by the Board to cases of variety chain stores, brewers’ warehousing stores, and food market and other retail service stores, where the Board, rather than embark on the *Usarco*-type inquiry, as a matter of policy adopts the entire municipality as the appropriate bargaining unit. The rationale for this narrow group of exceptions has been stated by the Board in, *inter alia*, *The Goodyear Service Stores* case, 65 CLLC ¶16,018:

“In our opinion, where an employer conducts essentially similar retail or service store operations at a number of locations in a given geographical area

it would not, generally speaking, be conducive to sound collective bargaining for a series of bargaining units to be established in respect of groups of employees performing similar tasks and having similar bargaining interests.”

See also *Fotomat Canada Limited*, [1979] OLRB Rep. April 306.

8. As both parties agreed, the present case falls to be decided on the basis of the *Usarco* line of inquiry. The respondent appears to operate two independent, non-integrated divisions, one at each location. The smaller division, the Wire Mesh Division, has its own general manager. Each plant hires and trains its own employees. There is no interchange of employees or supervisory staff, and the supervisory staff at each location have no authority at the other location. The two divisions manufacture entirely different products, albeit within the construction industry itself. The two divisions do not draw on common sources of raw materials and the sales staff are separate. There is no evidence that the customers are the same. The complete lack of functional interdependence is illustrated by the fact that the Wire Mesh Division observes a general Christmas shutdown for vacation purposes, while the Fabrication & Erection Division does not. The only real commonality is in the area of administration, covering such matters as payroll, credit checks, accounts receivable and accounts payable.

9. With regard to the element of common administration, the Board found a similar situation to exist in the *Commonwealth Holiday Inns* case, [1970] OLRB Rep. Oct. 749, but notwithstanding this, plus evidence of *some* limited transfer activity between locations, found a single inn to be an appropriate unit. In that case, it was the single inn for which the union applied for bargaining rights. The same was true, initially, in this case, but the applicant now requests the Board to define its bargaining rights so as to encompass both plants. The applicant did not, however, attempt to organize on the latter basis; or, if it did, there is no evidence before the Board in the present application to indicate any membership support whatsoever amongst the employees at Wilson Avenue. Having regard to this fact, together with the Board's own appraisal of the facts as they exist with respect to the criteria set out in the *Usarco* and other cases mentioned, (and notwithstanding the respondent's own reversal in this matter), the Board is of the view that there is no sound reason to sweep the Wilson Avenue employees into the bargaining unit on the strength of the applicant's support at the larger plant. Accordingly, the Board finds that all employees of the respondent working at its plant at 75 Ingram Drive, Toronto, save and except foreman, persons above the rank of foreman, office employees, and persons covered by a subsisting collective agreement between the respondent and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Field Erection), constitute a unit of employees of the respondent appropriate for collective bargaining.

10. A formal certificate will issue to the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JANUARY 1980

BARGAINING AGENTS CERTIFIED JANUARY 1980

No Vote Conducted

1437-78-R: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 2480, 2482, 3227, 1747 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) v. Toronto Civic Employees Union Local 43, C.U.P.E. (Intervener).

Unit: "all carpenters and carpenters' apprentices employed by the respondent on construction projects in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman and carpenters covered by a subsisting collective agreement between the respondent and the intervener made on July 14, 1978." (12 employees in the unit). (*Clarity note*).

1974-78-R: Ontario Nurses' Association (Applicant) v. Kent-Chatham Board of Health (Respondent) v. Group of Employees (Objectors).

Unit: "all registered and graduate nurses employed by the respondent save and except Supervisors – Public Health Nurse, persons above the rank of Supervisor – Public Health Nurse, the Administrator – Home Care Program, and persons regularly employed for not more than 24 hours per week." (26 employees in the unit).

2015-78-R: Canadian Food and Allied Workers Union Local 633 chartered by the Amalgamated meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets, A Division of Zehrmart Ltd. (Respondent).

Unit: "all meat department employees of the respondent in Wallaceburg, Ontario, save and except persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (4 employees in the unit).

2017-78-R: Canadian Food and Allied Workers Union Local 175 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets, A Division of Zehrmart Ltd. (Respondent).

Unit: "all employees of the respondent in Wallaceburg, Ontario, save and except store manager, meat department employees, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (15 employees in the unit).

2018-78-R: Canadian Food and Allied Workers Union Local 633 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets, A Division of Zehrmart Ltd. (Respondent).

Unit: "all meat department employees of the respondent in its store in Petrolia, Ontario, save and except persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (3 employees in the unit).

2019-78-R: Canadian Food and Allied Workers Union Local 175 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets, A Division of Zehrmart Ltd. (Respondent).

Unit: "all employees of the respondent in Petrolia, Ontario, save and except store manager, meat department employees, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (13 employees in the unit).

2095-78-R: Canadian Food and Allied Workers Union Local 633 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets, A Division of Zehrmart Limited (Respondent).

Unit: "all meat department employees of the respondent in its stores in Windsor, save and except persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (6 employees in the unit). (*Having regard to the agreement of the parties*).

2096-78-R: Canadian Food and Allied Workers Union Local 633 chartered by the Amalgamated meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets, A Division of Zehrmart Limited (Respondent).

Unit: "all meat department employees of the respondent in its stores in Chatham (except the respondent's store at 595 Grand Avenue West in Chatham), save and except persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (12 employees in the unit). (*Having regard to the agreement of the parties*).

0180-79-R: Canadian Food and Allied Workers Union Local 633 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets, A Division of Zehrmart Limited (Respondent).

Unit: "all Meat Department employees of the respondent in its store in the Township of Sandwich West, Ontario, save and except persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in the unit).

0246-79-R: Canadian Food and Allied Workers Union Local 633 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordon's Markets, A Division of Zehrmart Ltd. (Respondent).

Unit: "all meat department employees of the respondent in its store in Tilbury, save and except persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (5 employees in the unit).

0298-79-R: Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Maple Lodge Farms Ltd. (Respondent).

Unit: "all regular production employees of the respondent at its Plant in Norval, Ontario, save and except working foremen, persons above the rank of working foremen, dispatchers, office and clerical staff, technical and safety staff, sales and service department staff, chicken catchers, load checkers, field department staff, watchmen and security staff, cafeteria department staff, water and waste treatment department staff, machine operators, maintenance staff, bus drivers, employees regularly employed for not more than twenty-four (24) hours per week and students employed during a school vacation period." (487 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity note*).

0362-79-R: Canadian Food and Allied Workers Local 633 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordon's Markets, A Division of Zehrmart Limited (Respondent).

Unit: "all Meat Department employees of the respondent in Kingsville, Ontario, save and except persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (4 employees in the unit).

0516-79-R: Candian Food and Allied Workers Union Local 175 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets, A Division of Zehrmart Limited (Respondent).

Unit: "all employees of the respondent in its stores in Windsor, Ontario, save and except store manager, meat department employees and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (17 employees in the unit). *Having regard to this agreement*).

0517-79-R: Canadian Food and Allied Workers Union Local 175 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Gordons Markets, A Division of Zehrmart Limited (Respondent).

Unit: "all employees of the respondent in its stores in Kingsville, Ontario, save and except store manager, meat department employees and persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (8 employees in the unit). *Having regard to this agreement*).

0681-79-R: Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. J.H. Normick Inc. (Kirkland Lake Division) and Leo-Paul Turgeon (Respondent).

Unit: "all employees, cutters and skidder operators of the respondent engaged in its woods operation in the Township Midlothian, in the district of Temiskaming, and those townships immediately adjacent thereto, save and except foremen, persons above the rank of foreman, scalers, office and technical staff." (24 employees in the unit). *(Having regard to the agreement of the parties)*.

0867-79-R: United Steelworkers of America (Applicant) v. Metal Spray-On Limited (Respondent).

Unit: "all employees of the respondent in the City of Hamilton, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (8 employees in the unit).

1026-79-R: Canadian Food and Associated Services Union (Applicant) v. Federated Building Maintenance Company Limited operating as Commercial Building Services (Respondent).

Unit: "all employees of the respondent employed at First Canadian Place in the City of Toronto, save and except working foreladies, persons above the rank of working forelady, office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (125 employees in the unit).

1179-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. Napev Construction Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in Metropolitan Toronto, the Re-

gional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (12 employees in the unit).

1318-79-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Cassa Construction Company Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (4 employees in the unit).

1405-79-R: Canadian Union of Public Employees (Applicant) v. Township of Flamborough (Respondent).

Unit #1: “all employees of the Corporation of the Township of Flamborough save and except Foremen, Arena Managers and persons above the rank of Foreman and Arena Manager, Confidential Secretary, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (17 employees in the unit).

Unit #2: “all employees of the Corporation of the Township of Flamborough regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except Foremen, Arena Managers, persons above the rank of Foreman and Arena Manager and Confidential Secretary.” (2 employees in the unit).

1458-79-R: United Steelworkers of America (Applicant) v. Lanark Sheet Metal Works Ltd. (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff and maintenance manager.” (7 employees in the unit).

1480-79-R: United Electrical, Radio and Machine Workers of America (UE) (Applicant) v. Milltronics Limited (Respondent) v. The Employees’ Association of Milltronics Limited (Intervener).

Unit: “all employees of the respondent at Peterborough, save and except supervisors, persons above the rank of supervisor, office and clerical employees, salesmen, professional engineers and product specialists.” (125 employees in the unit). (*Having regard to the foregoing*). (*Clarity note*).

1530-79-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Cottrell Forwarding Co. Ltd. (Respondent).

Unit: “all office and clerical employees of the respondent in the Town of Vaughan save and except supervisors, persons above the rank of supervisor, confidential secretary to the Branch Manager, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (17 employees in the unit).

1587-79-R: The Canadian Union of Public Employees (Applicant) v. Timmins Public Libraries (Respondent).

Unit: "all employees of the respondent at Timmins, save and except the chief librarian, persons above the rank of chief librarian, reference librarian, confidential secretary to the chief librarian, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (15 employees in the unit). (*Having regard to this agreement of the parties*).

1596-79-R: Canadian Union of Public Employees (Applicant) v. Charterways Transportation Limited (Respondent) v. Group of Employees (Objectors).

Unit #1: "all employees of the respondent working at and out of Sudbury, Ontario, save and except operations manager, persons above the rank of operations manager, dispatcher, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (9 employees in the unit). (*Dismissed*).

Unit #2: "all employees of the respondent working at and out of Sudbury regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except operations manager, persons above the rank of operations manager, dispatcher, office and sales staff." (93 employees in the unit). (*Certified*). (*Clarity note*).

1637-79-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Valley East (Respondent).

Unit: "all office, clerical and technical employees of the respondent in the Town of Valley East, Ontario save and except the Commissioner of Works, Director of Operations, Road Superintendent, Assistant Road Superintendent, Fire Chief, Deputy Fire Chief, Recreational Director, Assistant Recreational Director, Parks Foreman, Treasurer and Clerk, By-Law Officer and Administrative Secretary." (14 employees in the unit).

1656-79-R: Ontario Public Service Employees Union (Applicant) v. Mississauga Association for the Mentally Retarded (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent operating in or out of Mississauga, Ontario, save and except the executive director, administrative co-ordinator, controller, financial assistant, director of residential services, director of transportation director of vocational services, director of pre-school services, manager of Dixie Woodworks, manager of ARC Industries, manager of Pack-it, manager of Print One, supervisor of Given Road Residence, supervisor of Haig Residence, supervisor of Creditview Residence, supervisor of Lakeshore Residence, secretary to the director of vocational services, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (57 employees in the unit). (*Having regard for the aforesaid agreement of the parties*). (*Clarity note*).

1665-79-R: Canadian Union of Public Employees (Applicant) v. Marycrest Home for the Aged (Respondent).

Unit: "all lay employees of Marycrest Home for the Aged in the City of Peterborough employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisor, persons above the rank of supervisor, professional medical staff, graduate and undergraduate nurses." (24 employees in the unit). (*Having regard to the agreement of the parties*).

1667-79-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union

No. 647 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of American (Applicant) v. General Bakeries Limited (Doyle's Wonder Division and Home Pride Division) (Respondent).

Unit: "all sales drivers, transport drivers, route runners, and special delivery drivers of the respondent working at or out of Kingston, save and except supervisors and persons above the rank of supervisor." (19 employees in the unit). (*Having regard to the agreement of the parties*).

1681-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. Demi Concrete and Drain Limited (Respondent).

Unit: "all construction labourers employed on residential construction, save and except construction labourers employed as helpers of bricklayers and plasterers, all cement masons and cement masons' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (15 employees in the unit).

1687-79-R: International Ladies Garment Workers Union (Applicant) v. Damar Fashions Inc. (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, shippers, mechanics, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (20 employees in the unit). (*Having regard to the agreement of the parties*).

1717-79-R: Teamsters Local Union 132, Chemical, Energy and Allied Workers Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Applicant) v. Witco Chemical Canada Limited (Respondent).

Unit: "all employees of the respondent working at Oakville, Ontario save and except foremen, those above the rank of foreman, chemists, chemical technicians, research staff, office and sales staff." (32 employees in the unit). (*Having regard to the agreement of the parties*).

1732-79-R: Ontario Nurses' Association (Applicant) v. St. Mary's General Hospital (Respondent).

Unit #1: "all lay, registered and graduate nurses employed in a nursing capacity by the respondent at Timmins, save and except Head Nurses, persons above the rank of Head Nurse, Employee Health Nurse and persons regularly employed for not more than twenty-four (24) hours per week." (00 employees in the unit).

Unit # 2: "all lay, registered and graduate nurses regularly employed for not more than twenty-four (24) hours per week in a nursing capacity by the respondent at Timmins, save and except Head Nurses, persons above the rank of Head Nurse and Employee Health Nurse." (00 employees in the unit).

1751-79-R: Canadian Union of Public Employee (Applicant) v. York Region Roman Catholic Separate School Board (Respondent) v. Ontario English Catholic Teachers' Association (Intervener) v. Employee (Objector).

Unit: "all office, clerical, technical employees employed with the York Region Roman Catholic Separate School Board save and except supervisors and persons above the rank of supervisor, Executive Secretary to the Director, Secretary to Superintendent of Business and Finance, Secretaries to the

Superintendents of Schools, Secretary of Personnel, Section Head, Accounting, Section Head, Payroll, Senior Payroll Clerk, Co-ordinator of Maintenance, Psychologist, Psychometrist and Counselor." (71 employees in the unit). (*Having regard to the agreement of the parties*).

1768-79-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. Alexandra Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of Alexandra Hospital at Ingersoll, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (00 employees in the unit). (*Having regard to the agreements of the parties*).

1769-79-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.L.C. (Applicant) v. Alexandra Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of Alexandra Hospital at Ingersoll, regularly employed for not more than twenty-four hours per week, and students employed during the school vacation periods, save and except supervisors and persons above the rank of supervisor and persons covered by subsisting collective agreements." (00 employees in the unit). (*Having regard to the agreement of the parties*).

1777-79-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. M & M Steel Erection (also known as A & C Holdings) (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and The Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in the unit).

1779-79-R: Greater Northern Ontario Trucking Association (Applicant) v. Walker Brothers Quarries Limited, Ridgemount Quarries Limited, Vineland Quarries & Crushed Stone Limited And St. David Sand And Gravel Limited (Respondents).

Unit: "all dependent contractors of the respondent, Walker Brothers Quarries Limited, working for the respondent in the regional municipality of Niagara save and except dispatchers, sales staff and office staff and those employees covered by a subsisting Collective Agreement between the respondent and the United Steelworkers of America." (8 employees in the unit). (*Having regard to the Agreement of the parties*).

1785-79-R: Labourers' International Union of North America, Local 527 (Applicant) v. Robert Laframboise Mechanical Limited (Respondent). (*Certified*).

- and -

1786-79-R: Labourers' International Union of North America, Local 527 (Applicant) v. Laframboise Construction (Respondent). (*Dismissed*).

Unit: "all construction labourers in the employ of the respondent in the United Counties of Stormont, Dundas and Glengarry, save and except non-working foremen and persons above the rank of non-working foreman." (24 employees in the unit).

1801-79-R: Service Employees Union Local 268 (Applicant) v. Wilson Memorial General Hospital (Respondent).

Unit: "all employees of the Wilson Memorial General Hospital in the District of Thunder Bay, save and except supervisors, persons above the rank of supervisor, professional medical staff, graduate nursing staff, under-graduate nurses, graduate pharmacists, under-graduate pharmacists, graduate dietitians, student dietitians, technical personnel, office and clerical staff and those covered by subsisting collective agreements." (27 employees in the unit).

1804-79-R: Amalgamated Clothing and Textile Workers Union - Toronto Joint Board (Applicant) v. K & K Clothing Limited (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except foremen, foreladies, persons above the rank of foreman and forelady, supervisors, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (00 employees in the unit). (*Having regard to the agreement of the parties*).

1807-79-R: Canadian Union of Public Employees (Applicant) v. Ottawa Roman Catholic Separate School Board (Respondent).

Unit: "all office and clerical employees of the respondent regularly employed for not more than 24 hours per week, save and except employees covered by subsisting collective agreements." (38 employees in the unit). (*Having regard to the agreement of the parties*).

1809-79-R: United Steelworkers of America (Applicant) v. Algonquin Fishing Tackle Division of Daiwa (Canada) Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff." (52 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity noted*).

1812-79-R: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Cooper Construction Company Limited (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent within a twenty mile radius of the North Bay post office, save and except non-working foremen and persons above the rank of non-working foreman." (11 employees in the unit).

1833-79-R: United Steelworkers of America (Applicant) v. Alexandra Centre Industries Limited (Respondent).

Unit: "all employees of the respondent in the Municipality of Elliot Lake, save and except foremen, persons above the rank of foreman, batcher, office and sales staff." (9 employees in the unit). (*Having regard to the agreement of the parties*).

1839-79-R: Office and Professional Employees International Union (Applicant) v. Ontario Teamsters Credit Union Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except general manager and persons above the rank of general manager." (9 employees in the unit).

1858-79-R: Local Union 1465, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Toronto Tile and Carpet Limited (Respondent).

Unit: "all employees of the respondent engaged in the installation of resilient flooring in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foremen." (3 employees in the unit).

1911-79-R: Labourers International Union of North America, Local 607 (Applicant) v. Cam Tar Construction (Respondent).

Unit: "all construction labourers in the employ of the respondent in the District of Rainy River, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

1951-79-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Applicant) v. Newmarket Steel Erections Ltd. (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (8 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

0919-79-R: Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Peel (Respondent).

Unit: "all employees of the respondent in Sheridan Villa Home for the Aged, Mississauga, Ontario regularly employed for not more than twenty-four hours per week, save and except supervisors, persons, above the rank of supervisor, professional medical and nursing staff, office, clerical and technical staff and students employed during the school vacation period." (60 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		41
Number of persons who cast ballots		15
Number of ballots marked in favour of applicant	14	
Number of ballots marked against applicant	1	

1707-79-R: Canadian Union of Public Employees (Applicant) v. Scarborough Public Library Board (Respondent).

Unit: "all employees of the respondent in Scarborough, Ontario save and except Director, Assistant Director, Personnel Officer, Business Administrator, Assistant Business Administrator (Budget Officer), Executive Secretary to the Director, Secretary to the Assistant Director, Secretary to the Personnel Officer, Secretary to the Business Administrator, Division Heads, and persons above the rank of Division Heads, Superintendent of Buildings and Property, Payroll Supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, and persons covered by subsisting Collective Agreement." (310 employees in the unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		140
Number of persons who cast ballots	129	
Number of ballots marked in favour of the applicant	89	
Number of ballots marked against the applicant	40	

Applications Certified Subsequent to Post-Hearing Vote

1155-79-R: The Association of Charter, Tour and Allied Drivers (Kitchener Division) (Applicant) v. Charterways Transportation Limited (Respondent).

Unit: "all employees of Charterways Transportation Limited from 3015 King St. East, Kitchener, Ontario, save and except mechanical staff, supervisors, persons above the rank of supervisor, office staff, school bus drivers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (5 employees in the unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of the applicant	6	
Number of ballots marked against the applicant	0	

471-79-R: Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of the District of Kenora (Respondent).

Unit: "all full-time employees of the Children's Aid Society of the District of Kenora, save and except supervisors in the towns of Kenora, Sioux Lookout, Dryden, Red Lake and Jaffray-Melick, persons above the rank of supervisor in the towns of Kenora, Sioux Lookout, Dryden, Red Lake and Jaffray-Melick, Group Home Administrator, Executive Director, Assistant Executive Director, Special Project Co-Ordinator, Supervisor Trainer, accountant, secretary to the Executive Director, persons working in the New Careers Program and persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period or on a co-operative work-study program." (42 employees in the unit).

Number of names of persons on list as originally prepared by employer		39
Number of persons who cast ballots	35	
Ballots segregated and not counted	2	
Number of ballots marked in favour of the applicant	21	
Number of ballots marked against the applicant	12	

1493-79-R: Canadian Union of Public Employees (Applicant) v. The Port Hope and District Hospital (Respondent).

Unit: "all employees of the respondent at Port Hope regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, chief engineer, office and clerical staff, persons above the rank of supervisor and persons covered by the Ontario Labour Relations Board of Certificate dated November 7, 1973." (20 employees in the unit).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots	16	
Number of ballots marked in favour of the applicant	16	
Number of ballots marked against the applicant	0	

APPLICATION FOR CERTIFICATION DISMISSED

No Vote Conducted

1099-76-R: International Federation of Professional and Technical Engineers, A.F. of L., C.I.O., C.L.C. (Applicant) v. Canadian General Electric Company Limited (Respondent) v. International Union of Electrical Workers, and its Local 599 (Intervener). (32 employees).

2067-78-R: Association of Commercial and Technical Employees, Local 1704 C.L.C. (Applicant) v. Province of Ontario Board of Internal Economy (Respondent). (30 employees).

0174-79-R: Construction Workers Local No. 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Perfection Insulations Limited (Respondent) v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Intervener). (4 employees).

0464-79-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC (Applicant) v. Robinson Cone, A Division of Dover Industries Limited (Respondent). (108 employees).

0472-79-R: The Carpenters' District Council of Toronto and Vicinity, on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 2480, 1963, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Cadillac Fairview Industrial Division (Respondent). (3 employees).

1000-79-R: Teamsters Local Union No. 647, Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Canada Bread, Division of Corporate Foods Ltd. (Respondent) v. Group of Employees (Objectors). (14 employees).

1390-79-R: Labourers' International Union of North America, (Local 527) (Applicant) v. Concorde Maintenance Limited (Respondent). (67 employees).

1683-79-R: The Hotel and Club Employees' Union, Local 299, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union, (A.F.L.-C.L.C.-C.I.C.) (Applicant) v. Guildwood Hall (Respondent) v. Group of Employees (Objectors). (114 employees).

1705-79-R: Service Employees' International Union, Local 183 (Applicant) v. Balmoral Lodge Limited (Respondent). (39 employees).

1708-79-R: Canadian Union of General Freight Handlers (IND) (Applicant) v. Shuntmaster Limited (Respondent).

Unit: "all employees of the respondent working out of Mississauga engaged in loading and unloading of freight, shunting and placing loads of freight save and except managerial personnel and security staff." (18 employees).

1756-79-R: Labourers' International Union of North America, Local 527 (Applicant) v. The Dale Corporation (Respondent). (14 employees).

1757-79-R: Canadian Union of Public Employees (Applicant) v. The Northumberland and Newcastle Board of Education (Respondent). (31 employees).

1787-79-R: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Trist Construction (Respondent). (3 employees).

1864-79-R: Service Employees International Union, Local 663 A.F. of L., C.I.O., C.L.C. (Applicant) v. Belleville General Hospital (Respondent). (12 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1624-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. Hutt Fence Limited (Respondent) v. International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721 (Intervener).

Voting Constituency: "All employees of the respondent in the District of Muskoka and all the Counties of Dufferin, Durham, Haliburton, Northumberland, Ontario, Peel, Peterborough, Prince Edward, Simcoe, Victoria and York, and in the County of Hastings, the Townships of Marmora, Rawdon, Sidney and Thurlow. Also, in the County of Halton – the premises of the Ford Motor Company engaged in the installation and/or erection of fences, partitions, guard or guiderails, and playground and recreational equipment, save and except non-working foremen and persons above the rank of non-working foreman." (21 employees).

Number of names of persons on list as originally prepared by employer		22
Number of persons who cast ballots	19	
Number of ballots marked in favour of the applicant	4	
Number of ballots marked against the applicant	15	

1699-79-R: International Molders & Allied Workers Union (Applicant) v. Teledyne Canada Metal Products (Respondent).

Voting Constituency: "All employees of the respondent at Woodstock, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (100 employees).

Number of names of persons on revised voters' list		98
Number of persons who cast ballots	94	
Number of ballots marked in favour of the applicant	22	
Number of ballots marked against the applicant	72	

1706-79-R: Teamsters Local Union No. 647, Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Darigold Products Limited (Respondent).

Voting Constituency #1: "All employees of the respondent working at Oakville, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (40 employees).

Number of names of persons on revised voters' list		42
Number of persons who cast ballots	36	
Number of ballots marked in favour of the applicant	10	
Number of ballots marked against the applicant	26	

Voting Constituency #2: "All employees regularly employed for not more than 24 hours per week and students employed during the school vacation period at Oakville, Ontario, save and except supervisors, those above the rank of supervisor, office and sales staff." (4 employees).

Number of names of persons on revised voters' list		42
Number of persons who cast ballots	4	
Number of ballots marked in favour of the applicant	0	
Number of ballots marked against the applicant	4	

1749-79-R: International Woodworkers of America (Applicant) v. Excan Company Limited (Respondent).

Voting Constituency: "All employees of Excan Company Limited, Heyden, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (20 employees in the unit).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	10	
Number of ballots marked in favour of the applicant	5	
Number of ballots marked against the applicant	5	

Certification Dismissed Subsequent to Post-Hearing Vote

2124-78-R: Canadian Food & Allied Workers, Local 175, chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO-CLC (Applicant) v. Valdi Inc. (Trading as Valdi Discount Foods) (Respondent).

Unit: "all employees of the respondent in its stores in Hamilton, Ontario, save and except the Assistant Store Manager and persons above the rank of Assistant Store Manager." (11 employees in the unit).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots	10	
Number of ballots marked in favour of the applicant	1	
Number of ballots marked against the applicant	9	

1693-79-R: Retail Clerks Union, Local 206 Chartered by United Food and Commercial Workers (Applicant) v. Elk's Men's Wear Stores, a division of Elks Stores Limited (Respondent) v. Group of Employees (Objectors).

1694-79-R: Retail Clerks Union, Local 206 Chartered by United Food and Commercial Workers (Applicant) v. Elk's Men's Wear Stores, a division of Elks Stores Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its retail stores in Brampton, Ontario, save and except store manager, persons above the rank of store manager, persons employed for not more than 24 hours per week and students employed during the school vacation period." (6 employees in the unit). (*Full-time*)

Number of names of persons on revised voters' list		9
Number of persons who cast ballots		6
Number of ballots marked in favour of the applicant	0	
Number of ballots marked against the applicant	6	

Unit: "all employees of the respondent at its retail store in Brampton, Ontario, working not more than 24 hours per week save and except Assistant Store Manager and persons above the rank of Assistant Store Manager," (6 employees in the unit). (*Part-time*).

Number of names of persons on revised voters' list		7
Number of persons who cast ballots		5
Number of ballots marked in favour of the applicant	1	
Number of ballots marked against the applicant	4	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1437-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Roma Excavating (Respondent). (3 employees).

1662-79-R: Construction Workers Local No. 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Demik Construction Limited (Respondent). (4 employees).

1728-79-R: Ontario Public Service Employees Union (Applicant) v. Scarborough Board of Education (Respondent) v. The Canadian Union of Public Employees (Intervener #1) v. Scarborough Educational Staff Association (Intervener #2). (838 employees).

1771-79-R: United Cement, Lime and Gypsum Workers International Union A.F.L. C.I.O. C.L.C. R.R. 2 Warsaw, Ont. KOL 3A0 (Applicant) v. Suppa Construction LTD 4 Manorhampton Dr; Weston, Ont. (Respondent) v. A Council of Trade Unions acting as Representative and Agent of Teamsters' Local Union 230 and Labourers' International Union of North America, Local Union 183 (Intervener). (2 employees).

1778-79-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Applicant) v. Action Millwright Service Ltd. (Respondent). (5 employees).

1799-79-R: United Brotherhood of Carpenters and Joiners of America (Applicant) v. Metalbestos Erectors Ltd. (Respondent). (6 employees).

1832-79-R: United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Bermingham Construction Ltd. (Respondent). (3 employees).

1836-79-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Wimco Steel Sales Co. Limited (Respondent). (2 employees).

1866-79-R: Canadian Union of Public Employees (Applicant) v. Barton Place Nursing Home (Respondent). (7 employees).

1883-79-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Lewis Insulations Services Ltd (Respondent). (12 employees).

1926-79-R: International Union of Electrical, Radio and Machine Workers (Applicant) v. Canadian Appliance Manufacturing (Respondent). (6 employees).

1927-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. Bell Aerospace Canada Division of Textron Canada Limited (Respondent). (7 employees).

APPLICATIONS UNDER SECTION 1(4)

1461-79-R: The United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Tesc Contracting Limited and T. Lachance Construction Limited (Respondents).

1788-79-R: Greater Northern Ontario Trucking Association (Applicant) v. Walker Brothers Quarries Limited, Ridgemount Quarries Limited, Vineland Quarries & Crushed Stone Limited and St. David Sand and Gravel Limited (Respondents).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0938-79-R: Mary Lockwood (Applicant) v. The Hotel and Restaurant Employees Union Local 743 Affiliated with the Hotel and Restaurant Employees and Bartenders International Union (Respondent). (*Granted*).

Unit: "all employees of the Elmwood Motor Hotel and Casino, save an except the Manager, office and supervision without limiting the generality of the foregoing, such excepted classifications shall include Assistant Manager; Maitres d'Hotel; Head Chef; Captains; Head Engineer and/or Head of Maintenance; Food Controller and Assistant; Head Housekeeper and Assistant; Supervisors; Supervisor or head of any new department or classification of employees; office and clerical staff and persons above the aforementioned classifications." (20 employees in the unit).

Number of names of persons on list as originally prepared by employer		20
Number of persons who cast ballots		16
Number of ballots marked in favour of the respondent	1	
Number of ballots marked against the respondent	15	

1358-79-R: Raymond Dwyer (Applicant) v. Local 442 of the Hotel and Restaurant Employees and Bartenders International AFL CIO CLC (Respondent) v. Niagara Falls Union Centre (Intervener). (*Granted*).

Unit: "all full-time employees of Niagara Falls Union Centre in the following categories: bartenders, waiters, caretakers and office help, excluding executive members also part-time members are covered in part (The Board notes that the collective agreement between the respondent and the intervener provides that "where terminology 'he, him, his or himself' is used; this also applies to 'she, her or herself'). (15 employees in the unit).

Number of names of persons on revised voters' list		16
Number of persons who cast ballots		13
Number of ballots marked in favour of respondent	1	
Number of ballots marked against the respondent	12	

1689-79-R: Gerald MacIsaac (Applicant) v. Warehousemen and Miscellaneous Drivers, Local 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. Cleanol Services (Intervener). (*Granted*).

Unit: "all employees of the said intervener at Metropolitan Toronto save and except foremen and dispatchers, persons above the rank of foreman and dispatchers, office staff, inside and outside sales staff, mechanics and persons regularly employed for not more than twenty-four (24) hours per week and students employed during summer vacation period." (57 employees in the unit).

Number of names of persons on revised voters' list		55
Number of persons who cast ballots		54
Number segregated and not counted	1	
Number of spoiled ballots	1	
Number of ballots marked in favour of the respondent	15	
Number of ballots marked against the respondent	37	

1770-79-R: Ernest Thauvette, Lucien Theoret & Marcel Menard (Applicants) v. Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) v. George Lanthier & Fils Ltee (Intervener). (3 employees). (*Dismissed*).

1816-79-R: Donna Marie Greenwood (Applicant) v. Local Union #1976 Pharmacists and Professional Employees Association, chartered by Retail Clerks International Union, affiliated with the Canadian Labour Congress, and AFL-CIO (Respondent) v. Madoc Manor Lodge and Retirement Home (Intervener). (3 employees). (*Granted*).

1840-79-R: June Hagerman (Applicant) v. The Pharmacists and Professional Employees Association, Local 1976, chartered by United Food and Commercial Workers International Union, C.L.C., C.F.L.,-C.I.O. formerly known as Pharmacists and Professional Employees Association, Local Union 1976, and Chartered by Retail Clerks International Union, C.L.C., A.F.L., C.I.O. (Respondent) v. Meadow Park Lodge Ltd. (Intervener). (2 employees). (*Granted*).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

1658-79-R: Canadian Union of Public Employees (Applicant) v. Staff Association of Children's Aid Society of Metropolitan Toronto (Respondent) v. Children's Aid Society of Metropolitan Toronto (Intervener). (*Granted*).

1815-79-R: Service Employees' International Union, Local 183 (Applicant) v. Plainfield Children's Home (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION THAT STRIKE UNLAWFUL

2015-79-U: International Harvester Company of Canada Limited (Applicant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. - C.L.C. Local 127 (Respondent). (*Withdrawn*).

2016-79-U: International Harvester Company of Canada Limited (Applicant) v. Ed Bell et al (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0554-79-U: United, Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO-CLC (Applicant) v. Barrday - Division of Wheelabrator Corporation of Canada Limited and William L. Little (Respondents). (*Withdrawn*).

0992-79-U: The Ontario Public Service Employees Union (Applicant) v. William J. Withrow, Herbert D. Grant, Catherine Goldsmith, John Ruseckas, Nancy Hushion, Jack Willson, Wilbert Headley and The Art Gallery of Ontario (Respondents). (*Withdrawn*).

1346-79-U: Local 1979, Retail Clerks International Union, Affiliated with the Canadian Labour Congress, AFL-CIO (Applicant) v. Wilson Automotive (Belleville) Ltd. (Respondent). (*Granted*).

1776-79-U: Labourers' International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 288 and Robert S. Eschauzier (Respondents). (*Withdrawn*).

1877-79-U: The Ontario Provincial Conference of The International Union of Bricklayers and Allied Craftsmen and The International Union of Bricklayers and Allied Craftsmen, Local 7 (Applicants) v. City View Flooring Company Limited (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0155-79-U: Sohinder S. Jolly (Complainant) v. Local 447 of the International Chemical Workers Union (Respondent). (*Withdrawn*).

0268-79-U: Basil Cosgrove (Complainant) v. United Auto Workers, Local 1285 (Respondent) v. American Motors (Canada) Limited (Intervener). (*Dismissed*).

0465-79-U: Ontario Nurses' Association (Complainant) v. Extendicare Ltd., North York (Respondent). (*Withdrawn*).

0629-79-U: United Steelworkers of America (Complainant) v. Great Lakes Rail Limited (Respondent). (*Withdrawn*).

0633-79-U: United Steelworkers of America (Complainant) v. Great Lakes Rail Limited (Respondent). (*Withdrawn*).

0683-79-U: Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America (Complainant) v. J.H. Normick Inc. (Kirkland Lake Division) (Respondent) v. Leo-Paul Turgeon (Intervener). (*Withdrawn*).

0711-79-U: United Steelworkers of America (Complainant) v. Great Lakes Rail Limited (Respondent). (*Withdrawn*).

0864-79-U: Stanley Dixon (Complainant) v. International Union United Automobile, Aerospace and Agricultural Implement Workers of America and its Local Union 439 (Respondent) v. Massey-Ferguson Industries Limited (Intervener). (*Dismissed*).

0905-79-U: Service Employees' International Union, Local 183 (Complainant) v. Hallowell House Limited (Respondent). (*Granted*).

0948-79-U: David Sharpe (Complainant) v. Service Employees International Union, Local 204 (Respondent) v. Royal Ontario Museum (Intervener). (*Dismissed*).

1044-79-U: Ontario Public Services Employees Union (Complainant) v. The Art Gallery of Ontario, Wilbert Headley and Herbert Grant (Respondents). (*Withdrawn*).

1198-79-U: Andy Grecco (Complainant) v. The Ontario Paper Company Limited and Canadian Paperworkers Union and its Local 84 (Respondents). (*Dismissed*).

1268-79-U: Office and Professional Employees International Union, and its Local 225 (Complainant) v. Master Mailers Ltd. (Respondent). (*Withdrawn*).

1269-79-U: Office and Professional Employees International Union and its Local 225 (Complainant) v. Master Mailers Ltd. (Respondent). (*Withdrawn*).

1311-79-U: Amalgamated Clothing & Textile Workers Union (Complainant) v. Joncott (Canada) Limited (Respondent). (*Terminated*).

1362-79-U: Amalgamated Clothing & Textile Workers Union (Complainant) v. Joncott (Canada) Limited (Respondent). (*Terminated*).

1350-79-U: United Steelworkers of America (Complainant) v. Fotomat Canada Limited (Respondent). (*Dismissed*).

1354-79-U: Bakery, Confectionery & Tobacco Workers International Union, Local 264 (Complainant) v. Kuemmerling Distilleries Ltd. and Dr. Hillers Peppermint Canada Ltd. (Respondents). (*Withdrawn*).

1435-79-U: Graphic Arts International Union, Local 12-L and Local 28-B (Complainants) v. Rolph-Clark-Stone Packaging, Ronalds-Federated Limited, and F.P. Publications Limited (Respondents). (*Granted*).

1507-79-U: Gail C. Seibert (Complainant) v. U.A.W. Local 1780 and Butler Metal (Respondent). *(Withdrawn)*.

1540-79-U: Frank Vagi (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and the U.A.W., Local 195 (Respondent). *(Withdrawn)*.

1545-79-U: Tony Graci (Complainant) v. Retail, Wholesale and Department Store Union, AFL:CIO:CLC and its Local 414 (Respondent). *(Dismissed)*.

1569-79-U: Clarence Jackson (Complainant) v. All Treat Farms Limited (Respondent). *(Withdrawn)*.

1573-79-U: United Rubber, Cork, Linoleum and Plastic Workers of America (Complainant) v. Phoenix Blending Ltd. (Respondent). *(Granted)*.

1590-79-U: Fritz Koebisch (Complainant) v. Ontario Hydro (Respondent). *(Withdrawn)*.

1605-79-U: Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers (Complainant) v. Antamex Limited (Respondent). *(Withdrawn)*.

1616-79-U: Harold Warren (Complainant) v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and the U.A.W., Local 195 (Respondent). *(Withdrawn)*.

1647-79-U: Gerry Lacey and Don Confiant (Complainants) v. Service Employees International, Local 204 (Respondent). *(Withdrawn)*.

1650-79-U: Richard Harvey and Leonard Brizio (Complainants) v. Retail, Wholesale and Department Store Union, Local No. 448 and Sirhc Holdings Incorporated, Carrying on Business as The Rid-out Tavern and The Garage Restaurant (Respondents). *(Dismissed)*.

1696-79-U: International Ladies Garment Workers Union (Complainant) v. Damar Fashions Inc. (Respondent). *(Terminated)*.

1697-79-U: Yvon Guillot (Complainant) v. Roger Charrette (Respondent). *(Withdrawn)*.

1758-79-U: James Edmund Taziker (Complainant) v. Local #543 Canadian Union of Public Employees, City of Windsor (Respondent). *(Withdrawn)*.

1763-79-U: Pauline Forand (Complainant) v. United Automobile, Aerospace & Agricultural Implement Workers, Local 1421 (Respondent). *(Withdrawn)*.

1764-79-U: United Cement Lime and Gypsum Workers International Union (Complainant) v. Barry J. Lawrence Management Ltd., Plastics C M P Limited, Lawment Trade Union, James J. Herr (Respondents). *(Withdrawn)*.

1774-79-U: Sheet Metal Workers' Local Union #540 on behalf of a group of employees who are part of the bargaining unit (Complainant) v. Selkirk Metalbestos (Respondent). (*Withdrawn*).

1775-79-U: Labourers' International Union of North America, Local 183 (Complainant) v. York Condominium Corporation No. 288 and Robert S. Eschauzier (Respondent). (*Withdrawn*).

1791-79-U: Allan Interisano (Complainant) v. International Union, United Automobile Aerospace and Agricultural Implement Workers of America Local 1383 (Respondent). (*Withdrawn*).

1795-79-U: The Staff Association of the Family and Children's Service of the Niagara Region (Complainant) v. Family and Children's Services of the Niagara Region (The Children's Aid Society of the Niagara Region) (Respondent). (*Withdrawn*).

1814-79-U: International Molders' and Allied Workers' Union, Local 28 (Complainant) v. Union Electric Supply Co. Limited (Respondent). (*Withdrawn*).

1825-79-U: Service Employees' International Union, Local 532 (Complainant) v. Graham Fiberglass Limited (Respondent). (*Withdrawn*).

1829-79-U: Christian Labour Association of Canada (Complainant) v. Versa-Care Retirement Lodge owned and operated by Versa-Care Centres of Ontario Limited (Respondent). (*Withdrawn*).

1830-79-U: Judith Lynne Smith (Complainant) v. Laborers' Pension Fund of Central and Eastern Canada (Respondent). (*Withdrawn*).

1831-79-U: Judith Lynne Smith (Complainant) v. Office and Professional Employees International Union, Local 343 (Respondent). (*Withdrawn*).

1837-79-U: Greater Northern Ontario Trucking Association (Complainant) v. Walker Brothers Quarries Limited, Ridgemount Quarries Limited, Vineland Quarries and Crushed Stone Limited and St. David Sand and Gravel Limited (Respondents). (*Withdrawn*).

1843-79-U: James J. Speirs (Complainant) v. Canadian Guards Association Local 102 (Respondent). (*Withdrawn*).

1857-79-U: Office and Professional Employees International Union (Complainant) v. Ontario Teamsters Credit Union Limited (Respondent). (*Withdrawn*).

1869-79-U: International Association of Bridge, Structural and Ornamental Ironworkers, Local 834 (Complainant) v. York Steel Construction Limited (Respondent). (*Withdrawn*).

1870-79-U: United Steelworkers of America (Complainant) v. Great Lakes Rail Limited (Respondent). (*Withdrawn*).

1929-79-U: Bakery, Confectionery & Tobacco Workers International Union, 264 (Complainant) v. Kuemmerling tilleries Ltd. and Dr. Hillers Peppermint Canada Limited (Respondents). (*Withdrawn*).

1931-79-U: Mr. C. J. Darrow, O.P.S.U. Staff Representative (Complainant) v. Windsor Western Hospital Centre (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 39

1575-79-U: Lloyd C. Hewitt (Applicant), v. Retail Clerks Union, Local 1977 (Respondent Trade Union) v. Zehrs Markets, A Division of Zehrmart Limited (Respondent Employer). (*Dismissed*).

1761-79-M: John Mehlenbacher (Applicant) v. Union of Canadian Retail Employees, Local 1000 (Respondent Trade Union) v. Cordesco Limited (Respondent Employer). (*Granted*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1533-79-M: Amalgamated Clothing and Textile Workers Union, Local 998 (Trade Union) v. Bayview Rental and Cleaning Services Ltd., (formerly Work Wear Corporation of Canada Ltd.) (Employer). (*Granted*).

1794-79-M: Local No. 399 International Union United Automobile, Aerospace and Agricultural Implement Workers of America (Trade Union) v. Arrowhead Metals Ltd. (Employer). (*Granted*).

1905-79-M: Inglis Limited (Employer) v. The International Union of Operating Engineers, Local 772 (Trade Union). (*Granted*).

APPLICATIONS UNDER SECTION 55

0266-79-R: Retail Clerks Union, Local 206, chartered by Retail Clerks International Union, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Darrigo Consolidated Holdings Inc. (Respondent). (*Dismissed*).

1128-79-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Metro Welding and Metro Ornamental Railing (Respondents). (*Granted*).

APPLICATION FOR THE COLLEGES COLLECTIVE BARGAINING ACT 1975, UNDER SECTION 82

1149-78-M: Ontario Public Service Employees Union (Applicant) v. Cambrian College of Applied Arts & Technology (Respondent). (*Granted*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

1730-78-M: Office and Professional Employees International Union, Local 166 (Trade Union) v. Spruce Falls Power & Paper Co. Ltd. Kimberly-Clark of Canada Ltd. (Employer). (*Dismissed*).

0643-79-M: Peterborough Civic Hospital (Applicant) v. Ontario Nurses' Association Local 66 (Respondent). (*Dismissed*).

0801-79-M: Canadian Union of Public Employees, Local 2027 (Trade Union) v. Glengarry Memorial Hospital (Employer). (*Dismissed*).

1200-79-M: Office and Professional Employees International Union, Local 290 (Applicant) v. Hamilton Wentworth Credit Union Limited (Respondent). (*Withdrawn*).

REFERENCE TO BOARD PURSUANT TO SECTION 96

1853-79-M: M.B.L. International Contractors Inc. (Employer) v. International Union of Operating Engineers, Local 793 (Trade Union). (*Terminated*).

APPLICATIONS UNDER SECTION 112A

0170-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. L. Fortier Excavating Ltd. (Respondent). (*Withdrawn*).

0671-79-M: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Metro Welding and Ontario Erectors Association (Respondents). (*Terminated*).

1124-79-M: Labourers' International Union of North America, Local 527 (Applicant) v. Vicbert Inc. (Respondent). (*Withdrawn*).

1136-79-M: Local Union 93, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Acto Builders (Eastern) Limited and Acto Construction & Engineering Ltd. (Respondents). (*Dismissed*).

1177-79-M: Local Union 105, I.B.E.W. (Applicant) v. Fraser Brace Engineering Company Limited (Respondent). (*Withdrawn*).

1204-79-M: Carpenters' District Council of Toronto and Vicinity on behalf Of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. E. J. Wright Central (Respondent). (*Withdrawn*).

1226-79-M: Labourers' International Union of North America, Local 183 (Applicant) v. Climb Forming Co. Ltd. (Respondent). (*Withdrawn*).

1524-79-M: Labourers' International Union of North America, Local 837 (Applicant) v. Faust Construction Limited (Respondent). (*Granted*).

1617-79-M: Labourers' International Union of North America (Applicant) v. Golden Triangle Cement Work (Respondent). (*Withdrawn*).

1635-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Frank's Concrete Pumping Co. Ltd. (Respondent). (*Granted*).

1719-79-M: Local 598 of the Operative Plasterers' and Cement Masons' International Association of the United States and Canada (Applicant) v. Preston Construction Ltd. (Respondent). (*Granted*).

1841-79-M: United Brotherhood of Carpenters & Joiners of America, Local 2486 (Applicant) v. Prosperi Plastering Co. Ltd. (Respondent). (*Withdrawn*).

1844-79-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Niagara Peninsula Insulation Limited (Respondent). (*Terminated*).

1859-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Zorko Plumbing Co. The Metropolitan Plumbing and Heating Contractors Association, a Division of the Mechanical Contractors Association Toronto (Respondents). (*Withdrawn*).

1861-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628 (Applicants) v. Aiton Power Limited (Respondent). (*Granted*).

1876-79-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and The International Union of Bricklayers and Allied Craftsmen, Local 7 (Applicants) v. City View Flooring Company Limited (Respondent). (*Withdrawn*).

1884-79-M: United Brotherhood of Carpenters and Joiners of America Local Union 1669 (Applicant) v. Antonyshyn Design & Decor Corporation (Respondent). (*Withdrawn*).

1890-79-M: Labourers' International Union of North America, Local 527 (Applicant) v. Murphy & Morrow Ltd. (Respondent). (*Withdrawn*).

1906-79-M: Labourers' International Union of North America, Local 183 (Applicant) v. Three Colour Construction Co. Ltd. 119 East Lynn Ave. Toronto, Ontario M4C 3X3 (Respondent). (*Withdrawn*).

1909-79-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Span Design & Construction Co. Ltd. (Respondent). (*Granted*).

1912-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. R. J. Moss Mechanical Limited. (Respondent). (*Withdrawn*).

APPLICATION UNDER SECTION 135

1877-78-M: Carpenters District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 2480, 2482, 1304, 3227 and 3233 of the United Brotherhood of Carpenters and Joiners of America (Applicant) v. Harbridge & Cross Ltd. (Respondent). (*Dismissed*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0798-79-R: Ontario Form Work Association (Applicant) v. A Council of Unions, Acting as the Representative and Agent of the Labourers' International Union of North America, Local 183 and the International Union of Operating Engineers, Local 793 (Respondents). (*Dismissed*). (*Accreditation*).

1649-78-R: Retail Clerks Union, Local 486, Chartered by the Retail Clerks International Union (Applicant) v. Robert Michaud (1978) Ltd. (Respondent). (*Certified*). (*Request Denied*).

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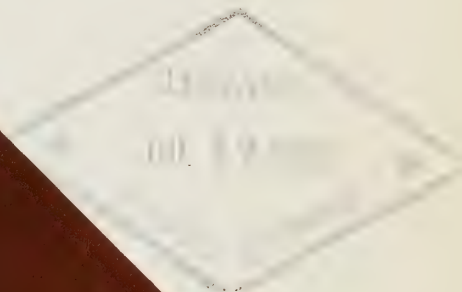
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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1980] OLRB REP.

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0833-79-R;0904-79-M Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Canadian Road Asphalts Limited**, Respondent, v. Group of Employees, Objectors. A Council of Trade Unions, acting as the representative and agent of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230 and Labourers' International Union of North America, Local 183; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union 230 and Labourers' International Union of North America, Local 183, Applicants, v. The Metropolitan Toronto Road Builders' Association and Bramall and Co. Construction Limited, Respondents.

Construction Industry – Related Employer – Board refusing to issue declaration – Whether production and haulage of asphalt to construction site coming within construction industry – Whether haulage from construction site coming within constructions industry

BEFORE: Ian C. A. Springate, Vice-Chairman, and Board Members H. J. F. Ade and D. B. Archer.

APPEARANCES: *Douglas J. Wray and Isaac Raymond for the applicants; G. Grossman and B. Harrop for the respondents; John W. Peddie, Vince Pozzebon, Gus LeCour and Simon Gaudette for the objectors.*

DECISION OF THE BOARD; March 3, 1980

1. File No. 0833-79-R is an application for certification filed by Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Teamsters Local 230"). The application was filed in accordance with the Board's Rules of Procedure governing applications for certification under the construction industry provisions of the Act. In the application Teamsters Local 230 is asking to be certified as the bargaining agent for all truck drivers employed by Canadian Road Asphalts Limited in the Board's construction area #8. For its part, Canadian Road Asphalts takes the position that it is not an employer in the construction industry, and further contends that the bargaining unit should not be restricted only to truck drivers.

2. File No. 0904-79-M is a referral of a grievance to the Board under section 112a of the Act. The grievance was referred to the Board by a Council of Trade Unions acting on behalf of Teamsters Local 230 and Labourers International Union of North America, Local 183 ("Labourers Local 183"). The grievance alleges that Bramall and Co. Construction Limited ("Bramall") is bound to a collective agreement between the council of unions and the Metropolitan Toronto Road Builders' Association, and that Bramall has violated the collective agreement in a number of ways. Accompanying the referral of the grievance to the Board was a letter from counsel for the Council of Trade Unions which states, in part, as follows:

"We understand there is a second company who may be involved in this case named Canadian Road Asphalts Limited. Teamsters Local Union 230 has made application for certification for employees of this second company, scheduled for hearing on August 21, 1979. (Board File No. 0833-79-R).

In this grievance and referral to the Labour Relations Board, the Applicant will be taking the alternative position that Canadian Road Asphalts Limited is bound by the collective agreement between the Applicant and the Respondent Association by reason of:

- (a) *Section 1(4)* of the Act, in that Canadian Road Asphalts Limited and Bramall and Co. Construction Limited carrying on associated or related activities or business under common control or direction; or
- (b) a sale of a business within *Section 55* of the Act has taken place from Bramall and Co. Construction Limited to Canadian Road Asphalts Limited."

At the hearing, no reference was made to any alleged sale of a business under section 55 of the Act.

3. For convenience purposes, the Board requested that the parties initially lead evidence and make representations with respect only to the following issues, namely: (a) who is the employer of the employees affected by the application for certification, (b) whether Bramall and Canadian Road Asphalts should be treated as a single employer pursuant to the provisions of section 1(4) of *The Labour Relations Act* and (c) whether or not the application for certification had been properly brought under the construction industry provisions of the Act.

4. Bramall was incorporated in 1952 and has since that time primarily been engaged in the construction of roads. The company directly employs both operating engineers and construction labourers. There is no dispute that Bramall is an employer for the purposes of the construction industry provisions of the Act. Bramall does not, and apparently never has, directly employed any truck drivers. The hauling away of materials from Bramall job sites is primarily performed by outside contractors, although approximately twenty per cent of this work is performed by truck drivers on the payroll of Canadian Road Asphalts.

5. From its incorporation in 1952 until 1960, Bramall was dependent upon outside firms for the supply of asphalt used in its road-building operations. In 1960 the persons who then controlled Bramall incorporated Canadian Road Asphalts to act as a supplier of asphalt. Canadian Road Asphalts in turn purchased a property in Mississauga on which was already located an asphalt plant and certain other facilities. Shortly after the purchase of the Mississauga site by Canadian Road Asphalts, Bramall moved its base of operation from Mimico to the same location.

6. Bramall and Canadian Road Asphalts utilize the same office facilities and staff. Some of the staff are on the payroll of one company, while some are on the payroll of the

other. The main building on the premises has a large Bramall sign on it, although a nearby scale house bears a Canadian Road Asphalts sign.

7. Ever since the incorporation of Canadian Road Asphalts in 1960, the ownership structure of both it and Bramall have been very similar, if not identical. Currently both companies are owned by the same group of three men. These three men serve as the officers and directors of both companies. Two of the owners do not play any direct role in the operations of either company. The third owner, Mr. Brian Harrop, is the secretary and vice-president of both companies and exercises control over the day-to-day operations of both. Mr. Harrop is paid by Canadian Road Asphalts, but that company charges Bramall for thirty per cent of his salary.

8. The actual asphalt making operations of Canadian Road Asphalts do not require many employees. Indeed, apart from Mr. Harrop and the office staff, the operation employs only a loader operator, a mixer and a scaleman. Canadian Road Asphalts also has on its payroll approximately seven truck drivers. It is these drivers who are the subject matter of the application for certification. All of the trucks driven by these drivers, with one exception, are owned by Canadian Road Asphalts. The exception relates to a single tractor which Mr. Harrop indicated he had purchased in Bramall's name in error. Each of the trucks bears a large sticker with Bramall's name on it, and under it a somewhat smaller sticker with the Canadian Road Asphalts name. Mr. Harrop testified that the Bramall name was put on the trucks for advertising purposes.

9. The majority of the truck drivers on the Canadian Road Asphalts payroll drive dump trucks. Although the percentages vary somewhat from driver to driver, approximately seventy-five to eighty per cent of the time of these drivers is taken up in hauling asphalt away from the Canadian Road Asphalts plant, usually to Bramall job sites. Sand and gravel used in the production of the asphalt is usually trucked to the asphalt plant by an outside contractor, although if a Canadian Road Asphalts driver is otherwise free he may also be assigned to this work. If there is no asphalt to be hauled, a driver may be directed to haul excavated material away from a Bramall job site. When this is done the Canadian Road Asphalts driver will either supplement the contractors regularly engaged in this work, or temporarily replace one of their drivers. Approximately twenty per cent of the time of Canadian Road Asphalts' dump truck drivers is spent in hauling excavated material away from Bramall's job sites. Bramall is billed for this time by Canadian Road Asphalts.

10. One of the Canadian Road Asphalts drivers drives a tractor to which can be attached either a tanker or a float. The tanker is used to pick up liquid asphalt from one of the oil companies and to haul it to the asphalt plant. The float is primarily used to take road-making equipment and supplies onto and off of Bramall job sites. At times the float and driver are hired out to other companies to haul their equipment. Another driver on Canadian Road Asphalts' payroll is employed to drive a fuel truck. This driver appears to spend the majority of his time at Bramall job sites servicing the road-making equipment.

11. Approximately eighty per cent of Canadian Road Asphalts' total asphalt production is sold to Bramall at a price slightly lower than that charged to its other customers. Other customers are generally required to pick up asphalt at the asphalt plant, although Canadian Road Asphalts' drivers do drive truck loads of cold asphalt to three municipalities who have been long-time customers of the company. For its part, Bramall received approxi-

mately eighty-five per cent of its total asphalt requirements from Canadian Road Asphalts. The remaining fifteen per cent is obtained from other asphalt suppliers who appear to be used only when the Canadian Road Asphalts plant is having operational difficulties or the job site is sufficiently removed from the plant so as to make it more convenient to use a local supplier.

12. Bramall is a member of The Metropolitan Toronto Road Builders' Association and as such is bound to a collective agreement between that association and a council of trade unions acting as the representative and agent of Teamsters Local 230 and Labourers' Local 183. Bramall is also bound to another collective agreement between the Association and the International Union of Operating Engineers, Local ("Operating Engineers Local 793"). The operating engineers and construction labourers employed by Bramall are all employed pursuant to the terms of these two collective agreements, and new employees are all hired through Labourers' Local 183 and Operating Engineers Local 793. The evidence indicated that Bramall's relationship with the three unions has remained essentially unchanged for at least the past ten years, and that at no point prior to the commencement of these proceedings has Teamsters Local 230 ever taken the position that it holds bargaining rights for truck drivers on the Canadian Road Asphalts payroll or that these drivers are in fact employees of Bramall.

13. On the issue of who employs the truck drivers in question, we have no hesitation on the evidence in concluding that they are employed by Canadian Road Asphalts and are not employed of Bramall. We are also of the opinion, however, that the two companies are carrying out associated or related activities under common control or direction and accordingly the Board has a discretion under section 1(4) to treat them as constituting one employer for the purposes of the Act.

14. Canadian Road Asphalts and Bramall have co-existed side by side for some twenty years. During most, if not all, of that period a council of trade unions, of which Teamsters Local 230 is a member, has held bargaining rights for employees of Bramall. However, at no time prior to these proceedings was it alleged by either the council of unions or Teamsters 230 that it held bargaining rights for employees of Canadian Road Asphalts. In other words, the unions were quite prepared to allow Canadian Road Asphalts over a number of years to build up a work force completely separate and apart from the organized employees of Bramall. In similar situations, the Board has consistently declined to apply section 1(4) so as to bring employees of an unorganized firm under a collective agreement with an organized firm, reasoning that in such circumstances it would be more appropriate for the union to obtain bargaining rights for the unrepresented employees through the normal certification procedures set forth in the Act. See: *Ellwall and Sons Construction Limited*, [1978] OLRB Rep. 555. We are of the view that the same reasoning is applicable in the instant case. Accordingly, we are not prepared to apply section 1(4) in such a way as to bring the employees of Canadian Road Asphalts under a Bramall collective agreement.

15. Counsel for Teamsters Local 230 acknowledged that this might not be a proper case in which to apply section 1(4) so as to bind the employees of Canadian Road Asphalts to a Bramall collective agreement. He submitted, however, that the Board should in any event apply section 1(4) for the purpose of considering whether the combined operations of Bramall and Canadian Road Asphalts are within the construction industry, as opposed to looking at the activities of Canadian Road Asphalts in isolation. Presumably this contention

relates to the issue as to whether or not the application for certification filed with respect to the employees of Canadian Road Asphalts was properly filed under the construction industry provisions of the Act. In our view, however, no useful purpose would be achieved by applying section 1(4) for such a purpose. A determination as to whether or not an application for certification should have been filed under the construction industry provisions of the Act involves a consideration only of the work engaged in by employees directly affected by the application. It matters not that other employees of the same employer may be employed either in or outside of the construction industry. In the instant case, only employees on the Canadian Road Asphalts' payroll are affected by the application for certification and accordingly we are concerned only with the work that they are engaged in.

16. We turn now to consider the question as to whether Canadian Road Asphalts is an employer for the purposes of the construction industry provisions of the Act. Section 106(a) of the Act defines such an employer as a person who operates a business in the construction industry. Section 1(1)(f) defines the construction industry in the following terms:

“ ‘construction industry’ means the businesses that are engaged in constructing, altering, decorating, repairing or demolishing buildings, structures, roads, sewers, water or gas mains, pipe lines, tunnels, bridges, canals or other works at the site thereof.”

17. We are of the view that the production of asphalt does not fall within any of the activities included in the definition of the construction industry and that accordingly employees engaged in asphalt production at the plant are not employed in construction activity. With respect to the drivers, the matter is somewhat more complex in that they are engaged in a number of different tasks. Certain of these tasks, such as hauling liquid asphalt, sand and gravel to the Canadian Road Asphalts plant, do not even take the drivers to any construction sites, and when they are performing these tasks we are satisfied that they are not engaged in construction work. The situation with respect to the delivery of asphalt to construction sites is not quite as clear cut. However, we are of the view that this task is properly classified simply as the delivery of materials to be used in construction, and not itself a construction activity. See: *Ethier Sand & Gravel Limited*, [1979] OLRB Rep. Oct. 962.

18. From time to time Canadian Road Asphalts' drivers are assigned to the hauling of excavated material away from a job site. Material excavated at a site is presumably loaded into the trucks by road-building equipment based at the site. In our view, this type of work is construction work, and when drivers are assigned to this work they are engaged in construction activities. In that the driver assigned to the fuel truck spends the great majority of his time in servicing road-building equipment on job sites, we regard him as also being engaged in construction work. The same is true with respect to the driver assigned to the float when it is being used to haul road-making equipment onto and off of job sites.

19. On the basis of the above, we are led to the conclusion that the truck drivers in the employ of Canadian Road Asphalts are engaged in both construction and non-construction activities. At the hearing the parties did not address themselves to the possibility that the Board might reach such a conclusion. Accordingly, the Board does not know whether the parties desire to have the application for certification apply only to the drivers when they are engaged in construction activities, or whether they would prefer to have the Board treat the application as if it had been filed under the general provisions of the Act to cover both con-

struction and non-construction activities. This will be one of the matters to be dealt with when the application for certification again comes on for hearing.

20. The Registrar is directed to list these matters for continuation of hearing. With respect to File No. 0833-79-R, the purpose of the hearing is to hear the evidence and the representations of the parties with respect to all outstanding matters relevant to the application for certification involving the employees of Canadian Road Asphalts. In File No. 0904-79-M the purpose of the hearing is to hear the evidence and representations of the parties with respect to the grievance filed against Bramall and The Metropolitan Toronto Road Builders' Association.

1262-79-M The Cottage Hospital (Uxbridge), Applicant, v. Ontario Nurses' Association, Respondent.

Employee – Relevant Criteria for determining exclusion from Act reviewed

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

DECISION OF THE BOARD; March 4, 1980

1. This is an application under section 95(2) of *The Labour Relations act*. The Cottage Hospital (Uxbridge) has asked the Board to determine whether Ms. Judy Chadwick is an employee for the purposes of the Act. A decision under section 95(2) of the Act responds only to the issue of whether or not an individual is an employee under the Act. The determination is not necessarily dispositive of the question of whether the individual falls within any particular bargaining unit.

2. The Hospital's position is that Ms. Chadwick, a registered nurse, exercises managerial functions within the meaning of section 1(3)(b) and is therefore not an employee for the purposes of the Act. The Hospital submits that she is part of senior management and would have a conflict of interest if included in the bargaining unit with other nurses. The Hospital emphasized that she operates independently of both the nursing department and the registered and graduate nurses in the bargaining unit. Emphasis was also put on the fact that she is paid at the same level as the nursing co-ordinator who is two steps above a registered nurse.

3. Section 1(3)(b) of the Act reads as follows:

“Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

In making determinations under section 1(3)(b) of the Act, the Board has continually recognized that effective collective bargaining necessitates an arm's length relationship between employees on the one hand and management on the other. The managerial exclusion in section 1(3)(b) is designed to exclude from the definition of "employee" those persons who, because of the exercise of managerial functions, would be placed in a conflict of interest if they were included in the bargaining unit and allowed to engaged in collective bargaining. The Board must assess the facts of each case to determine whether the duties and responsibilities in question have true managerial significance.

4. When assessing a professional person such as a registered nurse, the Board must distinguish between duties which emanate from an individual's professional training and duties which in fact reflect a managerial function. In *Essex Health Association*, [1970] OLRB Rep. Nov. 824 the Board noted, at 825:

"Professional or semi-professional employees such as head nurses have a different relationship with management in matters falling within their professional competence and the performance of their professional duties than employees engaged in production in other industries. While the criteria applied to determine whether professional or semi-professional persons exercise managerial functions are basically the same as with persons concerned with production, in applying such criteria a distinction must be made between functions which are of a managerial nature and functions which are inherent in the exercise of such persons' professional or technical skills."

In *Peterborough Civic Hospital*, [1973] OLRB Rep. Mar. 154 the Board at 156 further commented on factors relevant to the assessment of the employee status of a registered nurse:

"Nurses will participate in the decision-making processes which are relevant in the hospital's operations. Nurses are highly trained, and the combination of their training and experience permits them a consultative role which differs from employees in the industrial context; see *Ajax and Pickering General Hospital*, [1970] OLRB Rep. February 1283.

3. Over the years the Board has developed general guidelines to assist in evaluating whether an individual exercises managerial functions (see *Inglis Limited*, [1976] OLRB Rep. June 270, *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396 and *McIntyre Porcupine Mines Limited*, [1975] OLRB Apr. 261). For those persons whose work has little or no impact on the employment relationship, the Board looks to whether or not they exercise independent decision-making responsibilities in matters of policy or the running of the organization. The Act does not operate to exclude those who only make effective recommendations in this regard. Nor does it exclude persons whose independent decisions are either circumscribed within pre-determined limits set by others or limited to technical and procedural determinations flowing from their expertise in a limited field. (See *Libby, McNeil and Libby of Canada*, [1967] OLRB Rep. May 193; *Inglis Limited*, *supra*; and *Dominion Stores Limited*, [1976] OLRB Rep. Aug. 44 and *Canadian General Electric*, [1979] OLRB Rep. Jan. 12).

6. Different considerations apply to the work of a second group of persons who may be characterized as having a direct effect on the employment relationship or the terms and condition of employment of those in the employ of the organization. Supervisors of employees or those technical experts whose work affects terms and conditions of employment or hiring and employment policies would fall within this group. In determining whether such persons whose work has a direct effect on the employment relationship exercise managerial functions, the Board assesses whether or not they exercise effective control and authority over employees either in direct contact with the employees or through their decisions. In making this evaluation the Board looks to whether the person has, at a minimum, the authority to make effective recommendations relating to conditions of employment. An effective recommendation is a "serious recommendation that the evidence demonstrates is usually acted upon, and therefore a recommendation that materially affects the economic lives of employees". (*McIntyre Porcupine Mines Limited, supra*, at 289)

7. Ms. Chadwick, a registered nurse, has a three-fold responsibility. She is the In-Service Co-ordinator, the Staff Health Nurse and the Infection Control Officer. Ms. Chadwick does not supervise any employees and does not, for example, take part in hiring, firing or disciplining employees, although some of her duties have a direct impact on the employment relationship of others. Numerous other aspects of her work clearly do not have a direct impact on the terms and conditions of employment of other employees. Given the mix of her duties, the Board must consider both whether she has the power of effective recommendation and whether she exercises independent decision-making authority in matters of policy in the running of the Hospital.

8. As In-Service Co-ordinator, Ms. Chadwick facilitates and promotes educational programs for various departments in the Hospital. She does not make up the budget for the educational programs although she suggests to the Patient Care Committee how much money should be spent on education. The evidence does not reveal what weight the Committee places on her suggestion. Ms. Chadwick does not herself evaluate employees. She testified, however, that as part of her job as In-Service Co-ordinator, she assists with employee evaluations by providing input into the format to be used to carry out the evaluation. In this regard she works with department heads to develop evaluation forms which will be responsive to the particularized needs of the various departments. Additionally, she might provide health information relevant to an employee's evaluation from the standpoint of deciding whether or not a person could physically perform the job in question. The evidence establishes that the supervisor of the individual in question would have authority to overrule her appraisal. Ms. Chadwick stated her opinion that if a question arose over her assessment of an individual's physical ability to perform a job, consultation with the administrator and staff health physician should take place to resolve the matter.

9. The evidence of Ms. Chadwick's duties as In-Service Co-ordinator satisfied the Board that Ms. Chadwick does not, in this aspect of her work, perform managerial functions within the meaning of section 1(3)(b) of the Act. While Ms. Chadwick may express an opinion as to a person's physical ability to perform a job, the evidence establishes that she does not make either the final determination or an effective recommendation as that term has been interpreted by this Board. Additionally the Board is not persuaded that her role facilitating educational programs for the Hospital and providing input into the design of evaluation forms involves the exercise of managerial functions. Even if the Board were to conclude, as submitted by the Hospital, that Ms. Chadwick's duties relating to the evaluation

form have a direct impact on the employment relationship, the Board would not conclude on the evidence before it that her input constitutes an effective recommendation. The same conclusion must be drawn regarding her limited input into the formulation of the budget.

10. Ms. Chadwick is the Infection Control Officer. She is responsible for determining whether there are infectious agents on the floor with patients. The evidence establishes that all registered nurses make determinations of this nature although clearly Ms. Chadwick plays a dominant role. This aspect of her job clearly has no direct impact on the terms and conditions of employment of others. There is no evidence before the Board to support the conclusion that her duties as Infection Control Officer involve the exercise of independent decision-making authority in matters of policy and the running of the Hospital. Accordingly, the Board concludes that as Infection Control Officer Ms. Chadwick does not exercise managerial functions.

11. As Staff Health Nurse Ms. Chadwick performs staff physicals and immunizations. Additionally she decides whether a staff member is sufficiently sick to go home. In evaluating an individual's physical condition, Ms. Chadwick indicated that if a difference of opinion were to arise between herself and the individual, she would consult the staff health physician. It is apparent on the evidence that she does not have the authority either to make the final decision in the face of disagreement, or even the power of effective recommendation. Clearly, the physician would draw his own independent conclusions. The Board does not view this aspect of her responsibility as managerial but rather reflective of her professional skill. Additionally, her decisions in this regard do not directly affect an individual's employment relationship; they are not, for example, disciplinary decisions. Although her evaluation or series of evaluations relating to a particular individual may at some point be used by someone else in a way that might directly affect the individual's employment relationship, it is not Ms. Chadwick who in those circumstances would be the one exercising the managerial function. There is no evidence to support the conclusion that in this situation her evaluation of a person's physical condition could be properly characterized as an effective recommendation.

12. Finally Ms. Chadwick's performs some duties relating to Workmen's Compensation claims. Ms. Chadwick indicated that the job description of her duties as health care nurse filed with the Board was accurate. That description states that "... [u]nder administration, the nurse will ensure regulations under the Public Hospital's Act and Workmen's Compensation Board are carried out". The evidence relating to her role in processing Workmen's Compensation claims is extremely vague. Ms. Chadwick stated that she investigates claims and authorizes their payment. She indicated that in three years she had done approximately ten. There is no evidence whatsoever to indicate to the Board precisely what procedure Ms. Chadwick follows in investigating and authorizing Workmen's Compensation claims. If Ms. Chadwick looks into the circumstances of the injury to assess whether it is job-related and thus the proper subject of a Workmen's Compensation claim, and further performs the necessary paper work to send the claim to the Workmen's Compensation Board for processing, she would not thereby become managerial. Clearly it is the Workmen's Compensation Board which makes the final decision as to whether or not a claim should be paid. Nothing in the facts as set out in the Labour Relations Officer's Report indicates to the Board that Ms. Chadwick's role in processing Workmen's Compensation claims involves the performance of managerial functions. There is no evidence to suggest, for example, that Ms. Chadwick sets the Hospital policy regarding such claims. Moreover, even if

it could be said that these duties have a direct effect on the employment relationship of others, the evidence does not establish that she exercises power of effective recommendation.

13. For the reasons set out above therefore the Board is fully satisfied that Ms. Chadwick does not exercise managerial functions within the meaning of section 1(3)(b) of the Act. The Board is further satisfied that notwithstanding her access to employees' files she is not engaged in a confidential capacity in matters related to labour relations.

14. Accordingly, the Board finds that Ms. Chadwick is an employee for the purposes of the Act.

1704-78-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Applicant, v. Crawford Sand and Gravel Co., Superior Sand and Gravel Co., Respondents.

Employee – Three persons operating in partnership – Whether dependent contractors

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members F. W. Murray and H. Simon.

DECISION OF THE BOARD; March 24, 1980

1. This is an application for certification.

2. The Board has issued an interim certificate pending the determination of a dispute relating to the employment status of Messrs. G. Di Salvo, H. Di Salvo and F. Di Salvo. The union contends that they are dependent contractors like the other persons in the bargaining unit. The employer asserts, on the other hand, that because of the partnership arrangement in which the three brothers participate, the Board should find that they are employers who are not entitled to participate in collective bargaining under *The Labour Relations Act*.

3. The respondent is engaged in the business of supplying sand and gravel. The three brothers operate a partnership, "Di Salvo Brothers Trucking owned and operated by Hugh Di Salvo", registered under *The Partnerships Registration Act*, R.S.O. 1970, c. 340. They work full time for the respondent hauling gravel out of the pit. They have three trucks, each driven by one of the three brothers. No other person drives any of the trucks even if one of the brothers is sick and unable to drive.

4. Hugo Di Salvo has legal title to the three trucks and holds the P.C.V. licences. Each brother, however, contributed equally to their purchase. None of the brothers acts as boss. They make decisions jointly. The respondent makes out one pay cheque to the partnership but they divide it equally.

5. In *Canada Crushed Stone* [1977] OLRB Rep. Dec. 806, the Board commented on circumstances in which a person who would ordinarily be deemed by the Board to be a dependent contractor, is in fact not a dependent contractor within the meaning of section 1(1)(ga) of the Act. The Board stated at page 813:

“A dependent contractor with the authority to hire, fire, discipline and set the terms and conditions of employment in respect of others is not a dependent contractor entitled to the benefits and protection of *The Labour Relations Act*. If, however, it is found that a dependent contractor does not possess this type of authority, then, notwithstanding the fact that he may be the nominal employer of others, he may still be entitled to bargain collectively under *The Labour Relations Act*.”

(See also the Board's decision in *Superior Sand, Gravel and Supplies Ltd.*, [1978] OLRB Rep. Feb. 119).

6. In evaluating a person's working relationship, the Board must look to its substance, not its form. Although Hugo Di Salvo has legal title to the trucks and holds the P.C.V. licences, the evidence is clear that the three brothers have equal influence and control in the partnership; none is in a superior position to another which might reflect an employer/employee relationship. They each contributed equally to the purchase of the trucks; they make partnership decisions jointly and they each derive earnings from the partnership in equal portions. Unlike the situation in *Canada Crushed Stone*, *supra*, none of the brothers is in an entrepreneurial relationship with any of the others. No brother could be said to be substantially engaged in deriving profit from the labour of the other.

7. The Board therefore concludes from the evidence that the partnership arrangement entered into by the three Di Salvo brothers in this case does not place any one of them in an employer-employee relationship over any other one. The partnership does not detract from their status which, apart from the partnership, is agreed to be that of dependent contractors. The Board is further satisfied on the evidence that the partnership itself does not participate in entrepreneurial activity with respect to any other person outside the partnership. The evidence establishes that they hire no one else to drive their trucks.

8. For the reasons set out above and having regard to the evidence in its entirety, the Board finds that G. Di Salvo, H. Di Salvo and F. Di Salvo are dependent contractors under section 1(1)(ga) of the Act and therefore fall within the bargaining unit.

9. A final certificate will now issue.

2197-79-U Service Employees Union, Local 204 AFL-CIO., CLC,
Applicant, v. **Doral Construction Limited** and Michael Allen,

Lock-Out – Whether irrevocable mass termination of all employees lock-out

BEFORE: N. B. Satterfield, Vice-Chairman.

APPEARANCES: *J. Sack, S. Shrysmann and T. Small for the applicant; M. P. Forestell for the respondents.*

DECISION OF THE BOARD; March 19, 1980

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2. This is an application made under section 83 of *The Labour Relations Act* alleging that the respondents are threatening to call or authorize an unlawful lock-out. The applicant is seeking a declaration that the conduct of the respondents constitutes an unlawful lock-out. The applicant also is seeking, among other forms of relief, a direction that the respondents cease and desist from carrying out the illegal lock-out.

3. The conduct giving rise to this application was the issuing on Friday, February 5th of written individual notices of termination to the employees of Doral Construction Limited (“Doral”) to have effect as of Saturday, March 1st.

4. Doral is part owner and agent-manager of the Seaway Mall in Welland, Ontario, a retail shopping mall. It is responsible to its tenants under leasing agreements to provide the cleaning and security services for the common areas of the mall and it employs its own work force for this purpose. These are the employees, six in all, to whom the notices of termination have been issued. The events leading up to this action are few and uncomplicated.

5. The employees were dissatisfied with the results of their individual efforts to gain certain improvements in their working conditions and sought the intervention of the applicant. On Tuesday, February 12th an employee obtained application cards from the applicant and during Tuesday afternoon and evening all employees completed applications and paid their one dollar initiation fee for membership in the applicant. The next morning, Wednesday, one employee, Albert Petti, who was the collector for the applications, delivered the cards to the applicant. While Petti is referred to as the maintenance supervisor, there is no issue before me that he exercises managerial function within the meaning of section 1(3)(b) of the Act. The next afternoon, Thursday, Petti went to see his manager, Joe Demont, about a routine work matter. During the course of this meeting he decided to raise the subject of the improvements in working conditions which the employees were seeking. He had initiated discussions of the same sort previously with Demont. This one lasted about one and one-half hours and at the end of it Petti was not satisfied with the response which he had received so he told Demont that the employees were so dissatisfied that they had taken “extreme” action and had joined a trade union and were applying for certification. This was a spontaneous action on Petti’s part taken without the knowledge of the other employees for the purpose of trying to get Demont to improve working conditions. During Friday afternoon, February 15th, Demont started calling in employees individually and giving them their notices of termination which were worded as follows:

“I regret to inform you that as of March 2, 1980, the maintenance of the Seaway Mall will be contracted out to a maintenance firm and you are hereby notified that your employment with Doral Construction Limited as a maintenance man in the Seaway Mall will be terminated as of Saturday, March 1, 1980.

We appreciate your past year of good service but unfortunately current economic conditions dictate this decision.”

Petti learned of this action before he started his own shift that day, came into see Demont who confirmed that the action was being carried out and gave Petti his own notice. Petti asked Demont if anything could be done to alter the decision but Demont did not reply. This is consistent with the evidence of Mark Lariviere, the second of three witnesses for the applicant, who had been present with Petti during some of the previous discussions with Demont about wages and working conditions. Lariviere testified that, while Demont was critical of him and the other employees for being “led down the garden path” by the person whom Demont considered to be the instigator, Demont said nothing about the conditions which would have prevailed had the employees not joined a trade union.

6. Demont following his meeting with Petti on Thursday, February 14th, immediately contacted the respondent, Michael Allen who is President of Doral and Demont’s superior. Allen returned to the office and he and Demont discussed the situation, held a telephone conference with legal counsel and decided upon the ensuing action. By mid-day on Friday, Demont had made arrangements to contract out the cleaning to one firm and the security to another. When these arrangements had been made, he began issuing the notices of termination referred to in paragraph 5.

7. The respondents maintained in their respective replies that the decision to contract out the work in question was for economic reasons only and that the decision was made before they had any knowledge of an application for certification. (There is no evidence before me that an application for certification had been made, but it is matter of Board record that the applicant in this matter filed an application for certification on February 19, 1980.) In so doing, the respondents are contending that their actions fall within the saving provisions of section 68 of the Act which provides as follows:

“Nothing in this Act prohibits any suspension or discontinuance for cause of an employer’s operations or the quitting of employment for cause if the suspension, discontinuance or quitting does not constitute a lock-out or strike.”

At the hearing into this application, the respondents elaborated on their position that the decision was made on economic grounds. Demont, who was hired by Doral as manager of the mall on May 15, 1979, first inquired in August into the relative cost of continuing to do the cleaning work with Doral’s employees and contracting it out. While it appeared favourable to contract out the work, he decided to wait until the complete 1979 costs would be available in an audited statement before deciding one way or the other. In January 1980, instead of waiting for that statement, he states that he prepared a cost comparison using direct labour costs from Doral’s routine monthly financial reports and concluded that some \$25,000 annual savings were available. He maintains, therefore, that he made the decision to con-

tract out the cleaning work and obtained Allen's approval on or about January 20th, but decided to defer implementation until his calculations could be checked against the audited costs. When Demont learned, however, that his employees had joined a trade union he decided to implement his decision (without awaiting the audited costs) for fear that he would not be able to contract out the work once a trade union had been certified. While cost comparisons which purported to show that a substantial cost savings could be achieved by contracting out the cleaning work were filed in evidence, none of the documents from which the costs were said to have been extracted were available for examination. Having regard to that circumstance and for the manner in which the evidence in respect of the cost comparisons emerged in the hearing, I am not prepared to accept the respondent's position that the decision to contract out was taken in January and implemented February 15th. I find, therefore, that the decision to contract out the cleaning and security work was taken on February 15th when Demont obtained acceptable terms from the two contractors. Furthermore, while there may be sound business reasons for Doral to contract out the work in question, in the absence of conclusive evidence to that effect, I am not prepared to find that the decision to terminate the employees was for "purely economic reasons" as contended by the respondents. To the contrary, I find on the evidence that the decision to terminate the employees was a direct response of the respondents to learning of the presence of a trade union. The issue before me is whether that action taken in all of the circumstances extant in this case constitutes an unlawful lock-out.

8. The Act defines a lock-out in the following terms in section 1(1)(i):

"(1) In this Act,

- (i) 'lock-out' includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms or conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees."

That definition, as the Board stated in *Ralph Milrod Metal Products Limited*, [1977] OLRB Rep. Feb. 79, "... comprises both an objective and a subjective element."; the objective element being the action taken (i.e. the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees) and the subjective element being the purpose or motive underlying the action (i.e. to compel or induce employees to refrain from exercising rights or privileges under the Act or to agree to provisions or an altering of provisions respecting terms or conditions of employment). Both elements must be present before a lock-out may be said to exist or to have occurred. As further pointed out in *Ralph Milrod, supra*, there are two distinct purposes encompassed in the subjective element of the lock-out definition: the purpose of compelling or inducing employees to agree to terms of employment more favourable to their employer; and, the purpose of compelling or inducing employees to refrain from exercising rights or privileges under the Act. The actions contemplated by the objective part of the definition only become a lock-out if taken for one or the other of the purposes embraced by the subjective element of

the definition. There is nothing in the evidence before me from which the first purpose can be ascribed as the motivation for the respondents' action, so it remains to be determined if the evidence reveals the second purpose (i.e. to compel or induce employees to refrain from exercising rights under the Act) to be the motivation.

9. There can be no doubt on the evidence in this case that the respondent's actions were the product of an anti-union sentiment and have contravened more than one section of the Act dealing with unfair labour practices. Even were one to accept Demont's contention that he had merely decided to implement on February 15th a sound business decision made prior to his knowledge of the union's presence, the implementation decision was inspired, on his own admission, by the knowledge that employees had exercised their rights under section 3 of the Act. If these actions also constitute a lock-out, then it would clearly be an unlawful one since the conditions which section 63(2) requires be met are not satisfied. While it is clear that the employer has responded to the presence of the union in a manner which is of itself an unfair labour practice, was it for the purpose of compelling or inducing the employees to refrain from exercising rights under the Act?

10. The answer to that question turns on whether the evidence intimates directly or inferentially that Doral might retain all or some of the employees if they were to refrain from exercising rights under the Act. There is no intimation in the direct evidence that Doral was prepared to alter its decision, in fact the little direct evidence that there is tends to suggest the contrary. Demont was silent when Petti asked him if anything could change the decision to contract out the work and Lariviere stated that Demont said nothing to suggest that things would have been any different if the employees had not been "led down the garden path". Since there is no direct evidence which establishes that Doral's conduct was motivated by the purpose of getting employees to yield their rights or privileges under the Act, is such motive inferred by that very conduct?

11. Applicant counsel contended that the respondents' conduct clearly reveals such motive and argued that the circumstances of this case were on all fours with those in *Joyce and Smith Plating Company Limited of Hamilton*, 56 CLLC ¶18,048, in which the Board found an unlawful lock-out. The Board in that case found that the employer's refusal to continue to employ some 25 of its employees upon learning that they had attended a union meeting was for the purpose of getting them (and employees who had not attended the meeting) to agree, as a condition of continued employment, to desist from becoming or continuing to be members of the union. The Board found such purpose to be captured by the lock-out definition then contained in the Act, which did not include the words "... to refrain from exercising any rights or privileges under this Act ...". In April 1957, six months after the decision, the definition of lock-out was amended by adding those words. Since then the Board's cases show that it has consistently looked to whether the employer's decision was revocable and, if found to be, the Board has usually been able to infer from that situation that the employer's refusal to continue to employ is a device for compelling or inducing employees to accept alteration of working conditions or to refrain from exercising rights and privileges under the Act. The leading case in that respect is *Harry Woods Transport*, [1976] OLRB Rep. July 341. In that case the Board relied on earlier actions of the employer and the contents of individual notices of termination to find that the employer had not made an irrevocable decision to close its business and was attempting to use those notices to pressure employees to have the collective agreement re-negotiated. In other words, that the employer's action of giving notice that the business was being closed was motivated by the employ-

er's objective of having the collective agreement re-negotiated, the condition for remaining in business. If the decision is found not to be revocable, the situation in the instant case, it is more difficult to imply that the impugned action was designed to cause employees to accept a change in working conditions or to refrain from exercising rights and privileges.

12. A recent decision of the Board in *Rondar Services Limited*, [1977] OLRB Rep. Oct. 655 addresses this problem. The Board was dealing with the argument of trade union counsel that "... even an irrevocable decision to terminate which is motivated by a desire to impair rights under the Act is a lock-out." Counsel was relying on an *obiter* statement in *Ralph Milrod, supra*, that the statutory definition of lock-out "... would appear to include any situation in which the employer's refusal to employ employees is grounded in an unfair labour practice ...". The Board in *Rondar* was faced also with the opposing argument from respondent counsel that there was no lock-out proven because the applicant had failed "... to establish that the employees who received notice of termination had been compelled or induced to refrain from anything." (These arguments express the same relative positions of the parties before me). In the process of resolving the competing arguments in *Rondar, supra*, the Board examined the statutory definition of lock-out against the backdrop of the public policy aspect of the Act which, in the Board's words, is to "... maintain industrial and economic peace during the term of a collective agreement and pending utilization of the conciliation process." and, as well, analyzed the Board jurisprudence (see paragraphs 12 through 16 of the decision). The Board concluded at paragraph 15 that, indeed, there were circumstances where an irrevocable decision to terminate employees was captured by the statutory definition of lock-out and stated:

"... The definition contemplates and catches an irrevocable decision taken by an employer to refuse to continue to employ some of his employees with a view to compel or induce other employees to refrain from exercising rights under the Act etc. This is clear from a reading of the definition and fits within the policy considerations referred to above. It is within this context that the statement in the Milrod decision, *supra*, must be read. If it can be shown that an employer's refusal to continue to employ a number of his employees is rooted in an anti-union animus and if there are other employees who may be influenced within the meaning of the definition, an inference can be drawn that the motive for the employer's action falls within the statutory definition of 'lock-out'. It can be inferred that the employer's decision is designed, at least in part, to modify or alter the behaviour or conduct of those employees who remain within his employ."

The Board then summarized its conclusions as to the scope of the statutory definition of lock-out at paragraph 17:

"In summary, the definition of lock-out is designed to encompass employer initiatives which are motivated by a desire to compel or induce a modification or alteration in employee behaviour vis-a-vis rights or privileges under *The Labour Relations Act* or in the terms of employment. If the initiatives are revocable, then clearly an inference can be drawn as to motive which will bring the initiatives within the meaning of the definition. If the initiatives are irrevocable but it is established that

an anti-union animus has given rise to the refusal to continue to employ and there are other employees who could be influenced to refrain from exercising rights etc., then an inference can also be drawn as to motive which will bring the employer initiatives within the meaning of the definition.”

Since the scope of the statutory definition requires that, for an action to constitute a lock-out, an underlying motive for the action must be to compel or induce an alteration either in employee behavior or conditions of employment (i.e. to extract a concession from employees), an irrevocable decision cannot fall within the definition unless it is established that its purpose was to compel or induce those employees not directly affected by the decision to refrain from exercising rights under the Act (or alter working conditions). There is no evidence before me that the respondents’ action was devised for the purpose of compelling or inducing other employees to forego rights or privileges under the Act or to agree to an alteration of conditions of employment. In other words, there is no evidence that the respondents’ actions were devised for the purpose of “bargaining” a concession from employees in respect of rights and privileges under the Act or employment conditions. Therefore I must conclude that the respondents’ actions do not constitute a lock-out within the meaning of section 1(1)(i) of the Act.

13. In reaching this decision the Board is not saying that Doral was lawfully entitled to take the action to terminate its employees and contract out the work which they had been employed to do, it is only finding that this conduct, in the circumstances of this case, cannot be characterized as a lock-out within the meaning of the Act. The Board was asked to determine whether Doral had called or authorized an unlawful lock-out and the Board has found it had not. This does not mean, however, that the applicant or the employees are necessarily without recourse to remedies under section 79 of the Act if they wish to pursue them. That is not the matter which I was called upon to determine.

14. The application is dismissed.

1860-79-R Teamsters, Chemical, Energy and Allied Workers, Local Union No. 1552, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Emery Industries Limited**, Respondent v. United Rubber, Cork, Linoleum and Plastic Workers of America and its Local 446, Intervener.

Certification – Pre-Hearing Vote – Trade Union Status – Pre-Hearing vote held prior to trade union proving status – Local of ICWU obtaining new charter from Teamsters – Constituting itself into new local of Teamsters – Allegations of irregularities in merger between ICWU and Teamsters – Whether affecting trade union status of local

BEFORE: R. O. MacDowell, Vice-Chairman and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Harold F. Caley and James Phelan for the applicant; H. P. Rolph, L. Collins and S. Krashinsky for the intervener; no one appearing for the respondent.*

DECISION OF THE BOARD; March 19, 1980

1. This is an application for certification. The applicant, Local 1552 of the Teamsters Union, seeks to displace the intervener, Local 442 of the Rubber Workers Union, as the bargaining agent for some seventy-six employees of Emery Industries Limited, employed at the respondent company's Etobicoke location. For ease of reference we shall refer to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America as the "International Teamsters"; and the International Chemical Workers Union (not a party herein) as the "ICWU."

2. On January 2nd, 1980 Local 1552 of the Teamsters union applied for certification, and requested the taking of a "pre-hearing" representation vote. The respondent employer takes no position with respect to any of the matters raised in this certification application. The application for certification is opposed, therefore, only by the intervener. The intervener acknowledges that the certification application is timely, but contends that the applicant is not a "trade union" within the meaning of section 1(1)(n) of *The Labour Relations Act*; and that the Board had no jurisdiction to order a "pre-hearing representation vote" prior to an affirmative finding of trade union status. The intervener argues that, even if the Board is satisfied that the applicant was a trade union on the application date, there must still be another representation vote to test the wishes of the employees. The applicant argues that it is a trade union within the meaning of the Act, and that the intervener's alternative contention would nullify the whole purpose of the pre-hearing vote procedure, and would require the taking of a wholly unnecessary second representation vote. The applicant seeks a decision from the Board that the ballots be counted so that the employees' wishes can be ascertained.

4. The pre-hearing vote procedure is prescribed by section 8 of *The Labour Relations Act* as follows:

"(1) Upon an application for certification, the trade union may request that a pre-hearing representation vote be taken.

- (2) Upon such a request being made, the Board may determine a voting constituency and, if it appears to the Board on an examination of the records of the trade union and the records of the employer that not less than 35 per cent of the employees in the voting constituency were members of the trade union at the time the application was made, the Board may direct that a representation vote be taken among the employees in the voting constituency.
- (3) The Board may direct that the ballot box containing the ballots cast in a representation vote taken under subsection 2 shall be sealed and that the ballots shall not be counted until the parties have been given full opportunity to present their evidence and make their submissions.
- (4) After a representation vote has been taken under subsection 2, the Board shall determine the unit of employees that is appropriate for collective bargaining and, if it is satisfied that not less than 35 per cent of the employees in such bargaining unit were members of the trade union at the time the application was made, the representation vote taken under subsection 2 has the same effect as a representation vote taken under subsection 2 of section 7."

5. It is axiomatic that in labour relations matters "time is of the essence"; but this is especially the case in respect of representation votes. If the trade union's certification application, and its status as bargaining agent, are not resolved expeditiously (i.e., if it cannot engage in collective bargaining, or perform the other representational functions for which it was selected) there may be discontent among its supporters and a possible erosion of that support. This might not only make the union's certification more difficult, but could also complicate its collective bargaining task. The purpose of the pre-hearing, or "quick vote" procedure is to facilitate a prompt resolution of representation questions, by permitting the Board to test employee wishes as soon as possible following the application date. This avoids the potential prejudice which might arise if a representation vote had to await a decision following a formal certification hearing. Some delay is inevitable, but the pre-hearing vote procedure is a legislative attempt to remove some of the problems, and prejudice, associated with delay while, at the same time, ensuring that all of the parties will be given a full opportunity to make their submissions with respect to any matters in dispute.

6. The procedure prescribed by section 8 differs in some significant ways from the "ordinary" certification process. Upon an application for certification in which the trade union requests a pre-hearing representation vote, the Board need only determine a "voting constituency" – not a "unit of employees appropriate for collective bargaining" as it would under section 6(1) of the Act. Often the voting constituency and the bargaining unit ultimately determined will be the same; but this is not always the case, and it is for this reason that the Board is empowered to seal the ballot box pending a formal hearing. If the parties differ on the "shape" or description of the unit, the Board will direct that the ballots of some, or all, of the voters be segregated, and not counted, pending a resolution of this issue. Similarly, if it is contended that certain individuals are not entitled to vote, their ballots are segregated until their entitlement can be determined. Here, of course, there is no dispute with respect to the bargaining unit. If successful, the applicant union will obtain bargaining rights for the bargaining unit formerly represented by the intervener.

7. On a pre-hearing vote application the Board does not make an initial *determination* of membership support as it would under section 7 of the Act. Under section 7, a representation vote cannot be ordered unless the Board is *satisfied* that *not less than forty-five per cent* of the employees in the *bargaining unit*, are “members” of the trade union. Under section 8, however, the Board may order a representation vote if it *appears*, on an examination of the records of the trade union and the employer, that not less than thirty-five per cent of the employees in the *voting constituency* were members of the trade union at the time the application was made. The “pre-hearing” vote procedure involves a lower threshold percentage, and an initial onus on the union to establish only an “appearance” of support. Section 8(4) of the Act provides that a final determination, with respect to the bargaining unit and the trade union’s actual membership support, can take place *after* the representation vote has been taken. If the Board is satisfied that the trade union has the requisite employee support (not just the appearance of support) then the representation vote has the same effect as if it had been taken under section 7(2) of the Act. Again, it must be emphasized that if any contentious issue arises, section 8(3) empowers the Board to seal the ballot box until an objecting party has had a full opportunity to present evidence and make submissions at a formal hearing.

8. The application in the present case was filed on January 2nd, 1980 and, in support of the application, the applicant union filed membership evidence on behalf of some fifty-nine (i.e., approximately 75%) of the seventy-six employees in the bargaining unit. This documentary evidence was correct in all respects. It satisfies section 1(1)(j) and 92(2)(j) of the Act (as well as Rule 48 of the Rules) and was supported by a properly completed Form 8 Statutory Declaration. If this were an “ordinary” certification application, it would demonstrate a level of membership support well in excess of that required for certification without recourse to a representation vote. However, the practice of the Board in certification applications in which one union is seeking to displace another, is to exercise its discretion, under section 7(2) of the Act, to order a representation vote, notwithstanding an apparent level of support of more than fifty-five per cent. No doubt it was the applicant’s awareness of this practice which prompted it to opt for the pre-hearing vote procedure. It was likely that a vote would be ordered in any event and the applicant knew that a pre-hearing vote procedure would be faster.

9. On January 17th, 1980 the Board issued a decision ordering the taking of a representation vote, having found the requisite “appearance” of support among thirty-five per cent of the employees in the voting constituency. With respect to the question of the applicant’s trade union status, the Board (differently constituted) made the following observation:

“7. The status of the applicant as a trade union within the meaning of section 1(1)(n) of the Act has not been established in any prior proceeding before the Board. The intervener objects to the status of the applicant and submits that the Board is without jurisdiction to hold a representation vote until the status of the applicant is established. The Registrar is therefore instructed not to count the ballots and to seal the ballot boxes upon the taking of the representation vote pending further instruction from the Board.

8. Having regard to the objections raised by the intervener the Reg-

istrar is instructed to list this matter for hearing at the earliest possible date following the vote. The purpose of the hearing will be to allow the applicant the opportunity to establish its status as a trade union, and to hear the evidence and submissions of the parties on that issue and any other matter that may then be outstanding.”

10. On February 26th, 1980 the Board scheduled a hearing so that the parties could address these matters. As has already been noted, the intervener took the position that the Board had no jurisdiction to order a representation vote in advance of a finding of trade union status. Counsel for the union also raised (but did not press) the submission that since this panel of the Board is differently constituted from the previous panel it could not deal with the matter on its merits. In our view the earlier Board decision was an administrative one which did not finally determine the rights of any of the parties but, rather, expressly reserved their right to lead evidence and make submissions before any final determination could be made. This decision was in accordance with section 8(3) of *The Labour Relations Act*. The earlier panel heard neither evidence nor argument, and we do not think it was irrevocably seized with the application. In any event, having regard to the broad power of reconsideration vested in the Board by section 95 of *The Labour Relations Act*, this panel of the Board is satisfied that it can hear, and resolve, all of the outstanding issues between the parties herein. There may well be cases where, as a matter of law, one panel of the Board becomes irrevocably seized of an issue and, as a matter of sound practice, any reconsideration under section 95 of the Act should be exercised by that panel; however, this is not such case.

11. We have carefully considered the submissions of the intervener with respect to the jurisdiction of the Board to order a representation vote. Essentially, the intervener argues that until a trade union establishes its status, it is not entitled to make use of the pre-hearing vote procedure. We cannot accept this contention. There is no reason for according the “status issue” a special significance which removes it from the ambit of a legislative scheme which specifically provides for a resolution of disputed issues *after* a vote is taken. Of course, if one adopts a strict “sentence-parsing” approach, one encounters the word “trade union” before mention is made of such matters as employee status, the appropriate bargaining unit, and membership in the trade union; but, while it may appear that one determination is a condition precedent separate from the next, in our view it is clear, having regard to the purpose and structure of section 8, that the Legislature intended that all of these matters be resolved at a hearing *following* the vote. The Board cannot certify the applicant union until its trade union status is determined; but we can see no reason for singling out the trade union status issue for special treatment; nor can we discern any labour relations objective which would be served by denying new unions access to the pre-hearing vote procedure. There is no reason why these new unions should be put at a competitive disadvantage *vis-a-vis* established organizations, and it would require the clearest possible language before the Board would be driven to this conclusion. There may well be cases where the issues raised are of such nature, or complexity, that a pre-hearing vote is inappropriate. Section 8 is framed so that the Board has *a discretion* to order a pre-hearing representation vote, and Rule 5 of the Rules of Practice regulates the procedure which must be followed when the Board has refused this request. However, there is nothing in the issue of trade union status, *per se*, which prevents the taking of a vote, nor is there any evidence, in this case, of any other special circumstances which make such vote inappropriate or which justify any interference with the previous Board decision. In our view the Board was entitled to direct the taking of a vote and defer resolution of the trade union status issue.

12. We turn now to the question of the applicant's status as a trade union. Section 1(1)(n) of *The Labour Relations Act* provides as follows:

“‘trade union’ means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.”

13. Apart from section 1(1)(n) there are no legislative prescriptions concerning the form or structure of trade unions, and the Board has no authority to regulate the internal constitutional arrangements of an employee organization which otherwise meets the statutory definition. (See *CSAO National (Inc.) v. Oakville Trafalgar Memorial Hospital Association, et al.*, (1972), 26 D.L.R. (3d) 63 (Ont. C.A.) The Board has generally been satisfied that an organization is a “trade union” if there is *viva voce* evidence concerning the circumstances surrounding the formation of the entity; and if it is clear from the evidence that the entity is an *organization of employees*, formed for purposes that include collective bargaining, which is able to exercise the rights and undertake the obligations conferred upon it by the Act. (See generally: *Associated Hebrew Schools of Toronto*, [1978] OLRB Rep. Sept. 793 and cases cited therein.)

14. Mr. William Stack has been an employee of Emery Industries for sixteen years and, together with some nine other employees, works at the company's London, Ontario location. It is these ten employees who purported to form themselves into Local 1552 of the Teamsters union, through a series of meetings which took place on February 14, March 15 and May 9, 1979. It should be noted that at the time when these events took place, and for some years previously, Mr. Stack was the president of Local 552 of the International Chemical Workers Union, which was the bargaining agent for the employees at Emery Industries' London location. The employees who formed themselves into Local 1552 of the Teamsters union may also have been members of the ICWU at the time. This is unusual, but in our view nothing in *The Labour Relations Act* prevents a group of employees, who are members of, and represented by, one trade union from forming themselves into another. Dual membership is not uncommon in some industries, and section 38(2)(c) of the Act recognizes this possibility by providing an employee with certain protections if he is expelled from one union for becoming a member of another. Of course, the employees may have only one “exclusive” bargaining agent to represent them in their dealings with their employer; but neither the bargaining rights of Teamsters Local 1552, at the London location, nor that union's right to represent the London-based employees, are at issue in the present case. The sole question before us is whether the London-based employees have successfully formed themselves into Local 1552 of the Teamsters so as to establish that organization as a “trade union” within the meaning of section 1(1)(n) of *The Labour Relations Act*. If they did, the union is entitled to make the present application to represent the employees of Emery Industries Limited who are located in Toronto.

15. On February 14th, 1979 the ten employees held a meeting which was attended by Al Laforte, an organizer for the International Teamsters union, and Bud Mutimer, the former business representative of the International Chemical Workers Union. At that meeting the employees decided to form themselves into a local of the Teamsters union. The International Teamsters' constitution was circulated and approved; and it was decided to establish a

“local union” with an initial membership initiation fee of \$1.00 per person; and to apply to the International Teamsters for a local charter. The application for the charter was duly completed by seven of the individuals present, and the required \$25.00 charter fee was paid to Mr. Laforte. The original applicants (whose names appear on the local union charter) subsequently became officers of the new local union.

16. At a meeting held on March 15, 1979 a charter, sealed and executed by the general president and general secretary-treasurer of the International Teamsters, was presented to the employees, together with a copy of the by-laws for the new local union. It was moved, seconded, and unanimously decided, that these documents be accepted. Subsequently a membership fee of one dollar was paid by all ten individuals present, and each one signed a membership card. These membership cards are regular, in all respects, and are in the form commonly used by trade unions to demonstrate evidence of “membership”, as defined by section 1(1)(j) of *The Labour Relations Act*. Copies of by-laws were sent to the International for final approval, and temporary officers were selected. In subsequent meetings there was a re-affirmation of membership in Local 1552, nominations for executive positions were made and elections to these positions were held, and confirmed. The term of office for the officers begins on November 8th, 1979. *Ceteris paribus*, this series of meetings would normally be enough to establish trade union status within the meaning of section 1(1)(n) of the Act.

17. It was common ground between the parties that Mr. Stack and the other “prime movers” behind the creation of Local 1552 of the Teamsters union, were officers, or members, of Local 552 of the ICWU, who favoured a merger between the two parent international unions. It would appear that this purported merger occurred in the fall of 1978 or early in 1979. This merger, and its alleged effect, formed a principal part of the intervener’s argument.

18. The intervener contends that Local 1552 is a direct product of the merger, and that the employees formed themselves into Local 1552 at the direction of Mr. Mutimer, a former international officer of the ICWU, who was seeking to implement the merger agreement. The intervener argues that Local 1552 “traces its existence” to the merger arrangement so that any “taint” or impropriety involving the merger “flows through” and taints the status of Local 1552. The intervener submits that such impropriety exists, and that the merger arrangement was invalid, and unauthorized, by the ICWU constitution. Since the merger is invalid, the intervener reasons, Local 1552 of the Teamsters cannot be a trade union within the meaning of section 1(1)(n) of the Act.

19. The intervener requested the opportunity to call evidence and make argument in support of its contention that the merger was not authorized by the ICWU constitution. The intervener admitted, however, that it was attacking a contractual arrangement (see *Astgen v. Smith*, (1970), 7 D.L.R. (3d) 657 (Ont.C.A.) to which it was not a party. No members of the Teamsters, or the ICWU, (i.e., the individuals directly affected by the merger) have raised any question concerning the merger’s validity, nor is there any suggestion that the intervener represents any such individuals. The intervener is a stranger to the merger agreement. In addition, there is no suggestion, allegation, or evidence, that any of the individuals who formed themselves into Teamsters Local 1552 did so under duress, or any form of coercion, arising from the merger arrangement. Even if the merger provided the *motive* for employees to form themselves in Teamsters Local 1552, it was not clear to the Board why the

employees' motive, or views respecting the merger were relevant, so long as they had, in fact, taken the proper steps to form themselves into a new union. None of these employees have suggested that they were under any misapprehension as to the nature and quality of their acts, nor is there any evidence that this was the case. If the employees have formed themselves into a trade union within the meaning of section 1(1)(n) of the Act, how can the validity, or invalidity, of a merger between two other unions affect this result?

20. In view of the concern which the applicant expressed as to the relevance of the evidence which the intervener sought to adduce, the Board asked counsel to outline, in a summary way, the facts which he intended to establish. The Board was mindful of the need for expedition (the other parties and the employees have already been waiting for some time for a determination of the applicant's right to certification) and the Board was reluctant to adopt a mode of procedure which could result in a protracted series of hearings, if the evidence secured through that process was not directly relevant to the issues before us. Accordingly, counsel for the intervener set out the following outline of the facts which he intended to prove:

"In or about September, 1977 an affiliation agreement was entered into between the Canadian Conference of Teamsters and the Canadian Region of the International Chemical Workers Union. Between October, 1978 and January 20th, 1979, a further agreement was entered into between the ICWU and the International Teamsters, which provided for a merger between those two organizations. In that agreement, *inter alia*, the ICWU undertook to merge, amalgamate or transfer the bargaining unit jurisdiction of several locals, including Local 1552, to the Teamsters. The ICWU also undertook to have these locals do and perform all things required in order to permit applications under section 54 of *The Labour Relations Act*. The Teamsters union agreed that it would accept into membership persons who were previously members of locals of the ICWU, that it would accept outstanding collective agreement responsibilities; and that it would allow locals of the ICWU to apply for separate local charters, in accordance with the Teamsters' constitution. The Teamsters undertook, in addition, to establish a Chemical Worker division within the Canadian Conference, which would encompass these ICWU locals. The selection of a 'director' of the Chemical division was to be made by former ICWU members who had become members of the Teamsters union.

Following the merger of the two organizations, all rights of the ICWU locals were to be vested in the Teamsters union, although the assets of the ICWU locals were to be transferred to the new locals chartered by the Teamsters. The eight international representatives, formerly employed by the ICWU, were to become employees of the Teamsters. Any local of the ICWU which failed to do such things as were necessary to give effect to the merger would lose control of its local assets (which, it would appear, were actually 'owned' by the parent ICWU and would remain subject to the control of the parent organization for this purpose.)"

Counsel further indicated that he would be relying on the terms of the ICWU constitution which, he intended to argue, did not permit a merger along the lines outlined above.

21. Counsel for the applicant argued that the intervener is a total stranger to the merger agreement. It was neither a party thereto nor did it represent any members of the ICWU or the Teamsters who could be affected by the merger arrangement. In the circumstances, counsel contended, the intervener should not be permitted to attack the agreement. In any event, counsel contended that the existence, or validity, of the merger agreement was irrelevant to the narrow determination which the Board is required to make in this case. The London-based employees of Emery Industries wished to form themselves into a local of the Teamsters union. All of their conduct was directed to this end. Their precise reason for so doing is not relevant where, as here, there is no evidence that any one acted under any misapprehension as to the significance of this course of conduct. The bargaining rights of the new union, at the London location, are not in question. The sole issue before the Board is whether the steps taken by a group of employees (who, admittedly, may have been members or officers of another union at the time) were sufficient to create a new trade union organization within the meaning of section 1(1)(n) of *The Labour Relations Act*.

22. We have carefully considered the submissions of both parties and the cases which were cited to us. *Astgen v. Smith, et al*, *supra* was a dispute concerning the interpretation of the constitution of the of the International Union of Mine, Mill and Smelter Workers, and whether that constitution authorized a merger with the United Steelworkers of America. The issue in *Coca-Cola Ltd.*, [1975] OLRB Rep. Nov. 862 is summarized in paragraph 2 of the Board's decision as follows:

“The applicant claims status as a trade union by reason of this Board's previous recognition of the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers of America (the International union) as a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*. The applicant submitted that, since the applicant was merely the International union being carried on under a different name, status as a trade union followed from the Board's earlier recognition of the International union. In essence, the applicant was arguing that it was the same organization as the International union but had simply undergone a change of name.’

Neither case involves a fact situation or legal issue similar to the one presently before us. This is not a case pursuant to section 54 of *The Labour Relations Act*. The applicant union does not base its legal existence upon a purported merger between the Teamsters and the ICWU, or upon the trade union status of the merged organization. That agreement is not relevant to the narrow issue before us. Here, the question is whether the steps taken by ten individual employees have resulted in the creation of a trade union (known as Local 1552 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America) within the meaning of section 1(1)(n) of *The Labour Relations Act*. Having regard to the totality of the evidence we are satisfied that the answer to that question is “yes.” Even if the intervener were to prove all of the facts which it contends support its argument, we are satisfied that we would not reach a different conclusion.

23. Having regard to the foregoing the Board makes the following findings of fact and law:

- (1) As at January 2nd, 1980, the date of the present application, the applicant was a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
- (2) All of the employees in the business establishment of Emery Industries Limited located in Etobicoke, Ontario, save and except foremen, supervisors, persons above the rank of foreman or supervisor, office staff, sales staff, research and development staff, engineering staff and students employed in the Analytical and Control Laboratory during school vacation periods, constitute a unit of employees of the respondent appropriate for collective bargaining.
- (3) The Board is satisfied that not less than thirty-five per cent (35%) of the employees of the respondent in the bargaining unit described above were members of the applicant on 11th January, 1980, the terminal date fixed for this application.

Accordingly, the Board directs the Registrar to unseal the ballot box and count the ballots so that the wishes of the employees can be ascertained.

2128-79-R Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Inter-City Bandag (Ontario) Limited**, Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Certification – Whether both part-timers and students excluded from full-time unit when no history of part-timers – Board policy reconsidered

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Paul Brennan and Ralph Wedge for the applicant; J. Forbes-Roberts for the respondent; no one for the objectors.*

DECISION OF THE BOARD; March 24, 1980

1. This is an application for certification.

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4. The respondent has a history of employing students in the summer vacation period, but no history of employing part-timers (persons regularly employed for not more than 24 hours per week). The parties reached agreement on the following bargaining-unit description:

“All employees of the respondent working at Kingston, Ontario, save and except foreman, persons above and rank of foreman, students employed during the school vacation period, office and sales staff.”

5. The parties were advised that there was some question as to whether or not the Board would accept the above-described unit. While the Board will always take into account an agreement reached by the parties, the Board is not bound by that agreement, and may in fact decline to accept it if, in the Board's view, such agreement may do violence to overriding considerations of labour relations policy. It is ultimately for the Board to determine the unit of employees that is appropriate for collective bargaining, pursuant to its mandate set out in section 6(1) of *The Labour Relations Act*. (*Fonthill Lumber Ltd.*, 64 CLLC ¶16,305; *Tamco Limited*, [1974] OLRB Rep. Nov. 764.)

6. The Board's tendency, at least in recent times, has been to link students with part-time employees in order to make available to students a second bargaining unit, apart from the full-time unit, which will have some viability as a bargaining structure. The problem with the agreement of the parties in the present case is that future part-timers (if any) are, by the lack of an exclusion, automatically subsumed within the bargaining unit created by this application, leaving the students no opportunity to form a subsequent bargaining unit composed of any employees other than themselves.

7. The Board gave careful consideration to this problem in *Plummer Memorial Public Hospital*, [1979] OLRB Rep. May 433. There, the application was for a unit of part-time employees, from which both parties agreed to exclude students employed during the school vacation period. The Board had this to say:

“Where students employed during the school vacation period are excluded from a bargaining unit of full-time employees and an application for part-time employees is filed it is the practice of the Board to include both the part-time employees and the students employed during the school vacation period in the bargaining unit. The Board's practice is predicated upon its belief that students employed during the school vacation period could not form a viable bargaining unit standing alone and even if they could, the result would be to create an unduly fragmented situation. While the Board is receptive to agreements of the parties in respect of bargaining unit descriptions it will not accede to these arrangements where the result is to do violence to its policies. The Board is of the view that the agreement of the parties in this case to exclude students employed during the school vacation period from a unit of part-time employees would do fundamental violence to the policy of the Board in this regard . . .”

Accordingly, the agreement of the parties was rejected, and the applicant was certified for a bargaining unit composed of both part-time employees and students employed during the school vacation period.

8. As *Plummer* was the first clear articulation of the Board's policy not to sever part-time employees and students, even where the parties agree, the Board accepted an agreement of the parties to exclude students from a part-time unit in *The Regional Municipality of*

Peel, Board File No. 0919-79-R, a case already before the Board at the time the *Plummer* decision was issued. Since that time however, the Board has been quite rigid in its adherence to the “tandem” principle with regard to part-time employees and students. Thus in *Dominion Steel Export Co. Ltd.*, [1979] OLRB Rep. Oct. 953, the Board excluded both students and part-time employees from a full-time “all employee” unit, even though the employer had a history of employing students only, and not part-timers. And in *Banvil Limited* (unreported – Board File No. 1052-79-R), a case exactly analogous to the present one, the parties had agreed to exclude students but not part-timers from a full-time bargaining unit, on the basis that the employer had a history of hiring only the student category. Notwithstanding the agreement of the parties, the Board applied the tandem principle and described the full-time bargaining unit so as to exclude both students and part-time employees.

9. It must be recalled that *Plummer* dealt with a part-time application. As can be seen, however, the Board’s concerns expressed in *Plummer* over the availability for students of a viable bargaining structure (as well as the potential for fragmentation), have led the Board in subsequent instances to exclude from a full-time bargaining-unit description a non-existent category, i.e. part-time employees, contrary to its normal aversion to such a practice, and even to the agreement of the parties. Accordingly, the Board is of the view that its tandem principle relating to part-time employees and students ought to be less rigidly applied, and will do so both in dealing with full-time and with part-time applications. Where the parties are able to agree on the part-time/student question, whether it be to combine or sever the two groups (and whatever the employment history may be), the Board will, in the absence of special circumstances, accept that agreement.

10. Where there is a history of hiring only one or the other of the two groups, the Board will tend, in the absence of agreement by the parties, to exclude the “existent”, but not the “non-existent” group from a full-time unit. Where, however, a full-time unit excludes part-time employees and students, and an application is made for the part-time unit, the Board (again in the absence of agreement by the parties) will tend to keep the two categories combined, even though only one “exists”, in order to avoid undue fragmentation.

11. Similarly, where both groups exist and there is no agreement between the parties, the Board will likely treat the two groups in tandem, having regard to the community of interest which often exists between the two, as well as the usual concern over fragmentation.

12. In the present case, therefore, the Board has no difficulty accepting the bargaining unit agreed upon by the parties to this application.

13. The Board therefore finds that all employees of the respondent working at Kingston, Ontario, save and except foreman, persons above the rank of foreman, students employed during the school vacation period, office and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining.

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15. A certificate will issue to the applicant.

2107-79-R Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **J. & A. Cartage Limited** Respondent, v. Group of Employees, Objectors.

Certification – Petition – Prepared and circulated on company premises during working hours – Suggestions of improved benefits if union unsuccessful – Lay-offs co-inciding with certification application – Whether voluntary

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Paul Brennan and Al LeFort for the applicant; D. I. Wakely and V. D'Aliesio for the respondent; Manuel Zeballos for the objectors.*

DECISION OF THE BOARD; March 20, 1980

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. There were filed in this matter, in timely fashion, ten identical written statements expressing opposition to the applicant trade union in the following terms:

“February 19, 1980

RE: UNION

TO WHOM IT MAY CONCERN:

I, _____, an employee of J. & A. Cartage Limited, at 95 Rivalda Road, Weston, Ontario, do not want to have a Union come into J. & A. Cartage. I am happy with the working conditions as they are now, and I feel that I would not gain anything from a Union in our Company.

Yours truly”

4. In the absence of these statements of desire, the applicant is in a certifiable position. The overlap between the signatories to membership cards in the applicant and signatories to the statements of desire is sufficient, however, that it would normally cause the Board to direct a representation vote, provided the Board were satisfied of the voluntariness of the statements. The Board therefore conducted its usual inquiry into the origination and circulation of these statements of desire.
5. The “author” of the statements of desire which the Board has before it was an employee by the name of Manuel Zeballos. It was obvious from his evidence, however, that the real source of the statements was an employee named Eduardo Dalecio. Mr. Dalecio has

been with the company for approximately four years, and, like most of the employees, is generally employed as a truck driver. He does, however, have the additional responsibility of handling the telephone and dispatching when the owner is absent (as does another driver by the name of Albert Hanna, who appeared at the hearing as the advisor for the applicant trade union). The evidence of the employees called to give evidence for both sides establishes that Mr. Dalecio is not generally viewed as having any particular authority apart from the rest of the drivers. He was, at one time, the holder of some shares in the company, as security for a loan which he and another employee made to the owner. He testified that the loan has since been repaid, and he no longer holds the shares.

6. Mr. Dalecio's evidence was that the origination of the petitions against the applicant was his own idea, on the ground that he felt an operation as small as J. & A. Cartage did not need a union. He prepared a statement in the same form as that now presently before the Board, but with one additional sentence which read:

"I am treated fair in all respects by my employer, Vince D'Aliesio, and I want things to remain as they are at present."

He had it typed and copied during business hours by the owner's secretary, using company stationery. He testified that neither the owner, nor the owner's wife, who works in the office, were present at the time. There are no other supervisors in the company. He then, according to his evidence, "approached everyone", and obtained a number of signed statements. After he had done that, however, "rumours" surfaced concerning some of the statements he had made during circulation of the petitions, together with his relationship with the owner. There was substantial dispute in the evidence with regard to the statements in question, which Mr. Dalecio referred to before the Board as "misunderstandings". The applicant's evidence indicated Mr. Dalecio to have said: "What we are offering is OHIP and a dental plan"; Mr. Dalecio, supported by certain evidence called by the petitioners, testified that he was merely trying to find a compromise, and that what he said was that the drivers could accomplish their purposes without a union by getting together on their own, and that if they talked to management on that basis they might be able to get things like OHIP and a dental plan. He further testified that he got the idea about a dental plan from having seen a booklet on dental plans lying on the owner's desk, while he was passing through the owner's office on his way out to the yard. He assumed from that that the owner was considering a dental plan. The evidence established that two employees had been laid off at this time. The applicant's evidence indicated that Mr. Dalecio at the time of circulating the petitions also stated that if the union came in, there would be more layoffs. Mr. Dalecio testified that he only referred to the layoffs as indicating the economic state of the company. Whatever be the basis for these "misunderstandings", as Mr. Dalecio called them, he indicated that because of the talk about him, he decided to tear up the petitions which he had gathered.

7. The next day, the petitions presently before the Board were preped by Mr. Zeballos, another truck driver. He testified that he did not like the wording on Mr. Dalecio's petition, and accordingly decided to draft his own. As indicated, his own was in the same form as Mr. Dalecio's, but with the deletion of the last sentence. Like Mr. Dalecio, he had the petition typed and copied by the owner's secretary during business hours, using company stationery. There was again no one present from management. Mr. Zeballos then proceeded over the next two days, mostly in the yard while the trucks were being loaded in the

morning, to obtain the signatures of other employees. Mr. Zeballos testified that at this time the owner was in the dispatch office, as usual, but he could not tell whether the owner could see him talking to the other drivers or not. When Mr. Zeballos completed gathering the petitions, he delivered them to Mr. Dalecio. The only explanation given for this was that Mr. Zeballos himself did not have the time to mail the petitions. The petitions were thus delivered by Mr. Zeballos to Mr. Dalecio, together with a list of the names and addresses of the employees of the company, on Friday, February 22, and it was Mr. Dalecio who paid the cost of registration. The terminal date fixed by the Registrar for the mailing of such material was Tuesday, February 26.

8. The evidence also establishes that on February the 18th, the day before the application for certification was posted on the premises, Mr. Matthew Young and Mr. Albert Hanna, truck drivers for the company, were laid off. Mr. Young claims that in a discussion with the owner in the dispatch office at approximately 7 o'clock that morning, the owner Mr. Vince D'Aliesio (no relation to Eduardo Dalecio) told him that if the union got in, he would close the doors, and also indicated, indirectly, that he knew that both Mr. Young and Mr. Hanna were involved. Mr. D'Aliesio denied these allegations, and further testified that the first he heard of the union's application was when a lady from the Labour Board phoned him at 10 o'clock that morning, to inquire as to the correct address of the company for mailing purposes. He further testified that the choice of Mr. Young and Mr. Hanna had absolutely nothing to do with their union activity, but rather was based on his assessment of whom amongst his employees could best get along without the week's pay. In response to counsel for the applicant's question as to how he was in a position to make such an assessment of his various employees, Mr. D'Aliesio indicated that he could tell according to which drivers had come to him to borrow money. He further testified that he selected Mr. Hanna because of a prior statement by Mr. Hanna to the effect that employees should be laid off, but that he himself would never be laid off because he had been with the company too long.

9. The company submitted statistical evidence to substantiate the downturn in business during February, and this downturn was confirmed by all of the witnesses testifying before the Board, with the exception of Mr. Young. The company puts forward this downturn as the explanation for its layoff of Mr. Young and Mr. Hanna. However, in answer to the question as to why the layoffs specifically took place on February 18th, Mr. D'Aliesio could offer only a vague explanation about having been waiting for manufacturers to finish production runs (presumably with the hope that business would then pick up).

10. The only issue before the Board is the voluntariness of the petitions. In the light of all the circumstances, the Board finds Mr. D'Aliesio's explanation of the layoffs of Mr. Young and Mr. Hanna to be difficult, at best, to believe, and accordingly prefers the evidence of Mr. Young. The Board finds the layoffs of Mr. Young and Mr. Hanna were, on the balance of probabilities, intended to convey to the other employees the consequences of support for the applicant. More importantly, the Board finds that these layoffs would have been perceived in that way by the other employees. The precise words used by Mr. Dalecio respecting layoffs in the circulation of the first petition are therefore not critical. Reference to layoffs at that point in time would, in itself, be sufficient to underscore the message. With respect to the disputed evidence over the provision of OHIP and a dental plan, the Board finds Mr. Riggs to be the most credible of the witnesses, and accordingly finds that Mr. Dalecio would have been reasonably perceived by the majority of employees as speaking for management, having clearly no authority to "offer" anything on his own.

11. The first set of petitions, therefore, was clearly tainted. Did the second set of petitions escape the taint? We find it did not. The mere proximity in time to the threats of layoff and promise of benefits which the Board finds to have been communicated to employees would itself be sufficient to invalidate the second petition. But in addition to that, the second petition is scarcely unrelated to the first. It was circulated the very day following the demise of the first, in a form which employees would have no difficulty in recognizing as virtually a copy of the one promoted by Mr. Dalecio. The second set of petitions, once duly gathered, were then delivered to Mr. Dalecio. While not a matter necessarily known to the other employees of the company, this final point is nonetheless of assistance to the Board in maintaining in perspective the relationship between Mr. Zeballos and Mr. Dalecio in their respective roles, insofar as the petitions were concerned.

12. Because of the influences brought to bear on employees at the time the petitions filed with the Board were circulated, the Board is not satisfied that these petitions represent a voluntary statement of desire on the part of the employees who signed them, and further, that the said statements do not cast doubt on the evidence of membership filed in support of this application.

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15. A certificate will issue to the applicant.

1974-79-R International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), Applicant, v. Jutras Die Casting Limited, Respondent.

Bargaining Unit – Certification – History of students being employed – No history of part-time employees – Description of exclusion from full-time unit

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *H. Carl Anderson and Howard Powers for the applicant; Joseph Carrier and Ralph Webbe for the respondent.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL; March 4, 1980

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent in metropolitan Toronto save and except supervisors, persons

above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on January 30, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

5. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER O. HODGES:

1. I dissent.

2. The bargaining unit suggested by agreement of both parties in this case provides for the exclusion of part-time employees and students in a situation where there are no part-time employees and there has been no history of hiring part-time employees. There are no students now employed, but there is a history of hiring students. The applicant did not seek the exclusion of part-time employees or students; the agreement regarding these categories was reached at the request of the respondent at the hearing before the Board.

3. Under section 6(1) of the Act, the Board is required to determine the unit of employees that is appropriate for collective bargaining upon an application for certification. Where the parties have reached agreement on the description of the bargaining unit, the Board will take into consideration any such agreement of the parties in determining the appropriate bargaining unit, though not if it contravenes a Board policy. The Board is never bound by an agreement between the parties. (See *Tamco Limited*, [1974] OLRB Rep. Nov. 764.)

4. The Board's former policy regarding these two groups was clearly stated in *Wilson-Munroe Company Ltd.*, [1973] OLRB Rep. Dec. 647:

"The Board wishes to clarify a statement made to the parties at the hearing with respect to the exclusion from the bargaining unit of persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period. Where a party requests the exclusion of both categories and the employer has in his employ both categories as of the date of the application (or a past history thereof), then the Board will accede to the request. But where the Board upon the request of a party is asked to exclude only one category and there is in the employ of the employer as of the date of the application (or a past history thereof) employees of both categories, the Board will only accede to the request by excluding both categories. But where the employer has employees of only one category in his employ as of the date of the application (or a past history thereof), then the Board will accede to the request to exclude only that one category."

Recently, however, this policy has become somewhat modified.

5. In *Plummer Memorial Public Hospital* [1979] OLRB Rep. May 433, both parties sought to exclude students from a unit of part-time employees. The Board rejected this, stating:

“Where students employed during the school vacation period are excluded from a bargaining unit of full-time employees and an application for part-time employees is filed it is the practice of the Board to include both the part-time employees and the students employed during the school vacation period in the bargaining unit.”

6. In *Banvil Limited*, [1979] OLRB Rep. Oct. 919 there were no part-time employees and no history of hiring them. The parties agreed to exclude students; there were no students employed on the date of application, but there was a history of doing so. The Board reiterated its policy of including or excluding the two categories together when both are employed or there is a history of hiring them, then cited the reasons in *Plummer Memorial Public Hospital*, and said

“For the same reasons, it is the Board’s practice to include in or exclude from a bargaining unit *both categories* if *either category* is present.”
[emphasis added]

7. This practice was applied in *Kafko Manufacturing Limited* [1979] OLRB Rep. Oct. 994; the applicants were certified for a bargaining unit comprised of both part-time employees and students, although the respondent only employed students and had no history of part-time employees.

8. The practice was applied again in *Dominion Steel Export Co. Ltd.*, [1979] OLRB Rep. Oct. 953, where the facts were similar to *Kafko*: the respondent had a history of hiring students but no history of part-time employees – the Board excluded both categories together.

9. Lastly, in *The Regional Municipality of Peel*, Board File No. 0919-79-R, the facts were similar to *Plummer Memorial*, *supra*. The parties had agreed to exclude students from a part-time employees unit; there were students employed on the application date. However, the Board accepted the agreement of the parties in this case, having regard to, firstly, the collective bargaining history of the parties which had excluded students (a history which was consistent with the prevailing pattern in similar operations in the municipality), and, secondly, the timing of the applicant’s membership campaign, which results in it being unaware of the implications of the *Plummer* decision for its campaign.

10. In summary, these recent changes which have taken place reflect the Board’s conviction that, in general, students alone do not constitute a viable bargaining unit. Whereas in the past the Board would include or exclude the student category alone where there were no part-time employees or a history thereof, the Board now will describe the exclusion or inclusion in terms of both categories even though there is no history of nor are there any actual part-time employees.

11. However, these changes of description are merely cosmetic. In *Banvil Limited, Kafko*, and *Dominion Steel*, *supra*, although the exclusion is described as “part-time and students”, the reality in these cases is that the only excluded employees are students; they will have difficulty bargaining effectively and appear to be an inappropriate unit by themselves according to the reasoning of the Board itself in *Plummer* and other cases.

12. This new policy is also a departure from the general principle previously followed that part-time or student classifications are to be included in a bargaining unit where the employer has not had persons in such classifications in his employ prior to or at the time of the application. The Board must recognize that if they now adopt the practice of excluding non-existent categories, they are pre-determining the bargaining rights of whole groups of people who may be hired in the future.

13. The Board’s only alternative in cases like these would be to refuse to exclude students from the full-time unit where to do so would leave them standing alone. However, the Board has always made the exclusion when requested, presumably on the basis of the difference in interests between full-time and non-full-time employees. Furthermore, when describing the inappropriateness of student-only units, the context has been one where an alternative unit was under consideration, that is, students together with a part-time group.

14. If students alone will have difficulty in exercising their collective bargaining rights, it is incumbent on the Board to rectify this situation. It is clear that where there is a part-time group in existence or in the history of the employer’s work force, it is most appropriate for the students to be combined with them. However, if there is no part-time group in existence or in the history of the employer’s work force, the students should not be excluded from the full-time unit. This would establish a policy that the facilitation of students’ exercise of their collective bargaining rights outweighs the possible disparity of interest between them and full-time workers.

15. One final question arose in *Jutras Die Casting Limited*: did the wording “students employed during the school vacation periods” which was used, rather than the usual “students employed during the school vacation period” create any problem? The answer appears to be negative. The Board discussed the meaning of “student” and “vacation” in *United Co-operatives of Ontario*, [1970] OLRB Rep. Dec. 954. A vacation is a period during which there is a formal suspension of activity, and it is common for schools to have more than one such period in the year. In addition to the summer vacation, there is usually a Christmas vacation and there is frequently a week in the spring where activities are suspended. The students employed at these times have essentially the same interests as students who are employed only during the summer vacation period. Thus it is unnecessary to make any distinctions between the two groups, and the variation in the descriptions creates no problem.

16. For the foregoing reasons, I would find that, in these circumstances, the agreement of the parties in this case to exclude part-time employees and students employed during the school vacation periods should be rejected. I would find that all employees of the respondent constitute a unit of employees of the respondent appropriate for collective bargaining, and note that this was the unit originally applied for by the applicant.

2253-79-R Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers: Local No. 304, Applicant, v. **Laura Secord Division Ault Foods Limited**, Respondent. v. Bakery and Confectionery Workers' International Union of America Local 264, Intervener.

Certification – Pre-Hearing Vote – Applicant seeking displacement of incumbent union – Earlier termination application withdrawn – Employer requesting “no-union” choice on ballot – Whether “no-union” choice permitted

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J.A. Ronson and C. Balentine.

DECISION OF THE BOARD; March 31, 1980

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
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6. At the pre-hearing meeting with the Labour Relations Officer, the respondent requested that the ballot contain a “no trade union” choice; i.e., that the employees be given a choice of being represented by either the applicant or the intervener, or no trade union at all. Subsequent to that meeting, counsel for the respondent has filed written submissions with the Board in a letter dated March 27th, 1980 in support of its request. Counsel's letter correctly sets out the following brief history of certain matters relative to this application:
 - (a) the respondent and intervener are bound to a collective agreement which expires on March 31, 1980;
 - (b) on February 8th, 1980, an application for a declaration terminating the bargaining rights of the intervener was filed with the Board (Board File No. 2089-79-R);
 - (c) on February 29, 1980, the instant application was filed with the Board; and
 - (d) on March 10, 1980, the Board dismissed the application for a declaration terminating bargaining rights following a request from the applicant in that file to withdraw the application.
7. The respondent's letter sets out three grounds for seeking the additional choice of “no trade union” on the ballot. First, it contends that the employees who organized the petition in support for the application for a declaration to terminate the bargaining rights of the intervener encouraged employees to sign the petition on the promise that, once the intervener has been decertified, the employees would be able to choose which union would represent them. In this respect, the respondent refers to the wording in the final paragraph of a document which purportedly was circulated by the employees who organized the petition, the last paragraph of which contains the following wording:

“Once the B & C [the intervener] has been de-certified you will be able to select a union of your choice. We will inform you of suitable unions that could represent us, one of which could be bargaining for us in March. Until then you are completely covered by the existing contract.”

Second, the respondent contends that there were conditions present during the applicant’s organizing campaign which were not conducive to the exercise of free choice in the selection of a bargaining agent. In this respect, the respondent refers a document to the Board which purports to be the written statement of an employee alleging that an organizer for the applicant had made certain threats to the employee and to other employees of the respondent. As well, the respondent refers to the Board a copy of a letter which appears to be from the incumbent and is addressed to the Manager, Industrial Relations of the respondent. The letter contains allegations that employees were harassed to sign cards on behalf of the applicant. Third, the respondent relies on a letter addressed to the president of the Canada Labour Congress which purports to be from an official of the applicant in which references are made to the possibility of the employees seeking representations by still other trade unions, not affiliates of the Congress. The respondent contends that the employees should, therefore, have the choice of rejecting both the applicant and the intervener, “. . . thus preserving for the employees the option of being represented by some third union.”.

8. The Board is of the view that the issues raised by the respondent do not address themselves to the question of what choices should be available to the employees on the ballot in a representation vote, rather they deal with rights and protections which exist under the Act. The reference quoted above from the document purported to have been circulated during the petition campaign appears to the Board to be a reference to the rights declared under section 3 of the Act and not to having a choice of one or more unions on a ballot. If the employees are being harassed in the exercise of these rights, as alleged by the respondent, there is adequate protection in the unfair labour practice sections of the Act against various forms of harassment and an employee, or the applicant, intervener, respondent or any other trade union which can establish that it represents at least one of the employees may bring a complaint under section 79 of the Act seeking to have the Board enforce those protections. Similarly, an employee, the intervener, the respondent or any other trade union representing at least one employee can seek to discredit the membership evidence of the applicant on the grounds of the alleged harassment. In these ways the Act provides the appropriate means of dealing with the problems raised in the respondent’s submission.

9. As to the concern that the employees have their options of being represented by some other trade union preserved, this is precisely what the “open period” provided for under the Act does. The open period is the two month period ending on the expiry date of the collective agreement (subject to the provisions of section 53 of the Act). During this time the employees are free to decide to remain with their present bargaining agent; apply to have those bargaining rights terminated and remain unrepresented or select some other trade union to represent them instead. As a “one-step” alternative to having the bargaining rights of one union terminated and replacing it with another, the employees could seek to have some other trade union apply for certification which, if successful, would result in the incumbent trade union’s bargaining rights being terminated by the Board. These were the choices available to the respondent’s employees during the two months ending March 31st and, as noted above, they began to exercise one of these choices and are now exercising a

second one. Furthermore, just because one trade union applies to be certified during the open period does not prevent another one from doing so as well. It is not at all uncommon in the Board's experience for more than one trade union to apply to represent the same group of employees during the same open period under the Act or when the employees are not represented in collective bargaining. In fact, the respondent cites one of these cases in support of its request that the employees be given the choice of no trade union on the ballot. Counsel referred to the Board's decision in *Medi-Park Lodges Inc.*, [1977] OLRB Rep. Oct. 635, a decision in which the Board directed that a representation vote be held giving the employees a choice of being represented by either of two trade unions or by no trade union at all. That was a case, however, where the employees were not represented by any trade union at the time each applicant had filed applications for certification to represent these employees. In this type of circumstance, the Board has given the employees the aforesaid choice (see *Wholesale Homes Limited*, [1971] OLRB Rep. Dec. 818). In the instant application, the applicant trade union is seeking to displace the incumbent trade union as bargaining agent for employees. The incumbent has signified its desire to retain those bargaining rights by filing an intervention to the application. In these circumstances, the Board's practice is not to include the "no trade union" choice on the ballots since, to do so, would have the affect of converting the application for certification into an application for termination of bargaining rights. In this respect see the Board's decision in *Campeau Corporation Limited*, [1972] OLRB Rep. Feb. 167 and the under-noted reference therein to *Steinberg's Limited*, Board File No. 598-71-R (unreported):

"This matter has previously been disposed of in *Steinberg's Limited Case* . . . Board File No. 598-71-R where the Board stated as follows:

'14. Counsel for the respondent submits that in the event that the Board should direct the taking of a representation vote, there should be a "no union" option on the ballot. The applicant in the instant case is seeking to displace the new Local 486 as the bargaining agent for the employees of Steinberg's for which Local 486 now holds the bargaining rights. If the Board were to accede to the request of counsel for the respondent and place a "no union" option on the ballot, it could have the effect of turning a displacement application into an application for termination of bargaining rights. Having regard to the fact that there are other provisions under the Act for the making of an application terminating bargaining rights, the Board is of the opinion that this is not a circumstance in which it ought to exercise its discretion under section 92(6) of the Act and include on the ballot a choice indicating that the employees do not wish to be represented by a trade union. The request of counsel for the respondent accordingly is denied.'"

For the same reasons as stated by the Board in *Steinberg's*, *supra*, and since the Board does not find the respondent's submissions persuasive, the respondent's request to have a "no trade union" choice on the ballot is denied. Accordingly, voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

10. All employees of the respondent in the voting constituency on the 20th day of March, 1980, who have not voluntarily terminated their employment or who have not been

discharged for cause between the 20th day of March, 1980 and the date the vote is taken will be eligible to vote.

11. Counsel for the intervener, in his letter dated March 20, 1980, which accompanied the intervention, has alleged that the applicant has violated sections 61 and 59(2) of the Act and contends that the applicant, therefore, lacks credible membership evidence to sustain its application and furthermore that the application should be dismissed in the result. Consequently, the intervener has requested that the Board schedule a hearing prior to the conduct of the vote in order to enable it to present evidence and argument on the allegations. Having regard to the purpose of section 8 of the Act, which is to permit an applicant which is seeking certification and which appears to have the required membership support, to have its support tested in a representation vote without the delay of a hearing, the Board denies the intervener's request. The Board directs, however, that the ballot box be sealed upon conclusion of the representation vote pending further direction from the Board. The Board further directs the Registrar to put the matter on for hearing on the earliest available date for the purpose of receiving the evidence and argument of the parties in respect of the allegations contained in intervener counsel's letter of March 20th and to deal with any other issues that may then be outstanding.

12. The matter is referred to the Registrar.

0859-79-U The Niagara Falls Co-operative Taxi Owners Association and William Manson, Complainant, v. William Peters, Carrying on business as Niagara Veteran Taxi, Respondent.

Employee – Whether taxi owner/driver dependent contractor

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J.A. Ronson and D. B. Archer.

APPEARANCES: *H. P. Rolph, Keith Jennings and William Manson for the complainant; J. A. Roffey for the respondent.*

DECISION OF THE BOARD; March 17, 1980

1. This is a complaint filed under section 79 of *The Labour Relations Act*. The complainants, The Niagara Falls Co-operative Taxi Owners Association and William Manson, allege that the respondent company acted contrary to the provisions of sections 3, 56, 61, 63, 70 and 71 of the Act by terminating Mr. Manson's relationship with the respondent, Niagara Veteran Taxi.

2. As a preliminary matter, the employer contends that Manson, a taxi cab owner operator who until the date of his termination worked in association with Niagara Veteran Taxi, is not an employee for the purposes of the Act and is not, therefore, entitled to its protection. The complainants, on the other hand, argue that Manson is a dependent contractor

within the meaning of section 1(1)(ga) and is, therefore, an employee under the Act. The parties asked the Board to determine whether or not Manson is a dependent contractor prior to hearing the merits of the complaint. Through its Labour Relations Officer, the Board conducted an examination resulting in a transcript of evidence concerning Manson's relationship with the respondent. This is an interim decision directed solely to a determination of whether or not Manson is an employee.

3. "Dependent contractor" and "employee" are defined by the Act as follows:

"1.-(1) In this Act,

(ga) 'dependent contractor' means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment, machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor;

(gb) 'employee' includes a dependent contractor."

Issues to be addressed in the determination of whether Manson is a dependent contractor, therefore, include whether he performs work or services for Niagara Veteran Taxi for compensation or reward, whether Manson is in a position of economic dependence and whether he is under an obligation to perform duties for Niagara Veteran Taxi so that he is in a position more closely resembling the relationship of an employee than an independent contractor.

4. Clearly Manson performs services for Niagara Veteran Taxi. He services charge account runs and any other requests for taxi transportation which come to Niagara Veteran Taxi and are radio dispatched to him. The more difficult question is whether he performs the work or services for compensation or reward within the meaning of section 1(1)(ga) of the Act. The respondent argues that Manson is not a dependent contractor because, among other things, he does not perform services for Niagara Veteran Taxi for compensation or reward. Manson's taxi services are compensated; but they are compensated by his passengers, not by Niagara Veteran Taxi. It is common ground that, in general, Niagara Veteran Taxi does not pay any money to Manson or any other owner-operator of a taxi related to Niagara Veteran Taxi. In fact payments flow in the other direction, from Manson and other owner-operators to Niagara Veteran Taxi. When Manson first entered into his arrangement with Niagara Veteran Taxi thirty-two years ago, for example, he was required to pay an initial fee of \$500.00. Thereafter he paid weekly "dues" which at the time of his discharge were \$51.50. The weekly dues entitled Manson to use of the company's radio-dispatch service and other support facilities.

5. When Manson checks on the air, the company, through its dispatch service, assigns him runs. In general, Manson collects the full fare for these runs directly from the passenger. There are certain situations, however, in which money passes from Niagara Veteran Taxi to Manson and other owner-operators. The respondent operates charge accounts and

provides certain customers with regular taxi service. The practice is for the owner-operator to make out a charge slip for the fare and collect payment directly from Niagara Veteran Taxi which in turn receives payment from the customer by way of the charge account. Niagara Veteran Taxi can be viewed in that transaction as a conduit for compensation that flows essentially from the customer to the owner-operator.

6. The Board has previously had occasion to consider whether compensation flowing from a third party falls within the dictates of section 1(1)(ga). In *Blue Line Taxi Co. Limited*, [1979] OLRB Rep. Nov. 1056, the Board stated at 1065:

“In our view this single factor [that all compensation or reward flows to the owner-driver from the passengers] cannot be allowed to obscure the fact that the control of work opportunities by the respondent is of, and in itself, the *sine qua non* of the economic dependence which here exists, and the form of compensating for the service performed is determined by the type of market being served. This form of compensation, combined with the stand rental flowing back to the respondent, must be viewed in the total context of the taxi industry, and is not sufficient to make the driver more closely resemble an independent contractor than an employee.”

Section 1(1)(ga) does not stipulate that the compensation or reward must flow directly from the person with whom it is argued one has an employment relationship. Given the generality of the wording of section 1(1)(ga) and recognizing that the Act must be responsive to differences that exist from one industry to another, the Board concludes that the compensation received by Manson from third party passengers falls within the parameters of “compensation” referred to in section 1(1)(ga).

7. To what extent was Manson economically dependent on Niagara Veteran Taxi? The respondent argues that he could not be considered economically dependent because he, as with all Niagara Veteran Taxi owner-drivers, always had the concurrent option of picking up fares independently from its dispatch service. The evidence establishes that occasionally, due to an owner-driver’s lateness in checking on the air or his misconduct, he is suspended or “cut off the air” for a day or more by the respondent. The respondent submits that he is not economically dependent on Niagara Veteran Taxi because when he is cut off the air the owner-driver can still operate his taxi by using the public taxi stands or picking up private fares.

8. The amount of work available through independent pick-ups in Niagara Falls varies substantially with the tourist seasons. Manson testified that the period from July through Labour Day is busy. During that time about one-third of his total business would be derived through independent pick-ups, with two-thirds coming from the Niagara Veteran Taxi dispatch service. In the off-season, however, Manson testified that the bottom drops out of the taxi business and that in that period, which constitutes three-quarters of the year, 90 per cent of his business would flow from the dispatch service. Manson emphasized that in the off-season charge runs would prove particularly important because they provided a sizeable amount of predictable business. Some days he would make only \$10.00 to \$12.00 above the charges. The economic importance of Manson’s relationship with Niagara Veteran Taxi is under-scored by his earnings since his discharge. During that time he has worked exclusively

as an independent. His maximum daily earnings have been \$24.00. He testified that while working with Niagara Veteran Taxi, he might have made between \$110.00 and \$120.00 a day. In addition to the charge runs, the difference may further be attributable to the respondent's working arrangements with Dominion Stores, Skylon and Loblaws, all of which have direct telephone lines to Niagara Veteran Taxi. Stands at some key locations in Niagara Falls are restricted to the respondent's cabs.

9. The Board concludes from the evidence that the small amount of work which Manson obtained independently of Niagara Veteran Taxi was in the nature of a seasonal supplement which in the circumstances does not detract from the substantial reality that Manson was economically dependent on Niagara Veteran Taxi. (See *Flinkote Company of Canada Limited*, [1978] OLRB Rep. Sept. 822.) Manson relied on Niagara Veteran Taxi for the vast bulk of his economic gain. He did no advertising on his own behalf and depended for his livelihood on the goodwill developed by Niagara Veteran Taxi rather than by himself. We note in this regard that Manson was required to have a roof sign on his taxi with Niagara Veteran Taxi's name and phone number. Manson's economic dependence is further exemplified by the fact that he purchased his relationship with Niagara Veteran Taxi with a \$500.00 payment and maintained it with a weekly payment of \$51.50. (See *Dufferin Aggregates*, [1978] OLRB Rep. Mar. 278.) If Manson were not dependent on Niagara Veteran Taxi for his economic well-being, a question would arise as to why he would pay such substantial sums to maintain his association with the respondent. The Board views this as strong evidence of the need for an association with a dispatching service. The importance of an association with a taxi company was demonstrated to some extent by Manson's testimony relating to his inability to sell his father's taxi cab and licence which were not associated with Niagara Veteran Taxi even after reducing the price three times. Manson contrasted this experience with the example of his brother's taxi cab and licence which were associated with Niagara Veteran Taxi and sold in one day.

10. We turn now to consider the question of whether Manson was under an obligation to perform duties for Niagara Veteran Taxi in a way more closely resembling the relationship of an employee than an independent contractor. In this respect the amount of control exerted by Niagara Veteran Taxi over Manson's work becomes particularly relevant.

11. Some aspects of Manson's working relationship with Niagara Veteran Taxi have the ear-marks of the situation typical of an independent contractor. If Manson is sick and can't work on any particular day or succession of days, he need not notify Niagara Veteran Taxi. He can take vacations whenever he wants and for however long he wants. If he were to return from vacation later than expected it would not be incumbent upon him to notify Niagara Veteran Taxi of his delay. Manson is fully responsible for the care of his own taxi-cab. He pays, for example, for all repairs. He is financially responsible for his car insurance and licence plates. Additionally, Niagara Veteran Taxi makes no deductions for income tax, Unemployment Insurance Benefits, Canada Pension Plan or Workmen's Compensation coverage. Nor does Niagara Veteran Taxi contribute to any health, life or accident insurance plans in which Manson participates.

12. A careful review of the evidence, however, establishes that Mr. William Peters, the owner of Niagara Veteran Taxi, exerts a high degree of control over the work of Manson and the other owner-drivers. If owner-operators want to work the day shift they have to check in by 8:15 in the morning or they will be cut off from dispatching services for the entire

day. If they work the day shift they're not allowed to work on the air past 9:00 p.m. While an owner-operator is ordinarily allowed to decide for himself what shift to work, the evidence establishes that Niagara Veteran Taxi exerts the ultimate authority in this regard to ensure that it has a sufficient number of cars on each shift. It may dictate, for example, that an owner-operator must put a driver on his car if he does not want to drive the shift. Manson testified that once he refused to put a driver on because he had had too many accidents using drivers. Peters insisted, however, and Manson testified that he was left with no choice but to accommodate Peters. Moreover, when an owner-operator on his own initiative wants to put a driver on his cab, as Manson has done on occasion, the driver has to be approved by Peters.

13. Peters has established rules. Many of them are reflective of the controlling By-Laws of the Niagara Regional Board of Commissioners of Police. Some are personal to Niagara Veteran Taxi. All of these rules are enforced by the respondent through the use of penalties ranging from fines to suspension (being cut off from dispatch services) to discharge. The public By-Laws establish dress regulations, but Peters has imposed an additional rule that prohibits owner-operators from wearing shorts in the summer. If an owner-operator is dispatched to a charge account run and subsequently decides that he would prefer to take an independent pick-up, he is liable to be cut off the air if he doesn't service the charge account. If an owner-operator takes a fare dispatched to someone else, he is subject to discipline. If a complaint is received from a customer about a driver's language or manners then he may be cut off the air.

14. The nature of the control Peters exerts over the owner-operator is reflected in a notice issued on May 1, 1979:

"NIAGARA VETERAN TAXI CO.
CORNER BRIDGE & SECOND
NIAGARA FALLS, ONTARIO

May 1, 1979

NOTICE: ALL OWNERS AND DRIVERS

THE PRACTICE OF CHECKING OUT ON JOBS THAT MAY
NOT BE TO YOUR LIKING MUST STOP AT ONCE.

ALSO, CERTAIN DRIVERS HAVE AN ARRANGEMENT
WITH BELLHOPS AND A PAYOLLA EXISTS FOR OUT OF
TOWN TRIPS; OUR SWITCHBOARD WILL NOT CATER TO
THESE DRIVERS FOR PERSONAL CALLS.

THIS NOTICE IS A FAIR WARNING TO ALL; YOU WILL BE
DISMISSED IF THIS PRACTICE CONTINUES - DRIVERS AND
OWNERS.

'William Peters' "

A warning of this nature reflects a permanent and continuing relationship controlled by a party closely resembling the typical employer.

15. The totality of the evidence satisfies the Board that Manson, associated solely with

Niagara Veteran Taxi for thirty-two years, was economically dependent on it and under an obligation to perform duties for it in a manner that more closely resembles the relationship of an employee than an independent contractor.

16. Counsel for the respondent referred the Board to its decision in *Seven-Eleven Taxi*, [1976] OLRB Rep. April 134 arguing that its similarity to the instant case should cause the Board in this case to conclude in a like manner that the owner-drivers are independent rather than dependent contractors. Important differences, however, exist between the evidence discussed in *Seven Eleven Taxi* and the evidence before this Board. The evidence in the *Seven-Eleven Taxi* reflects far fewer instances of control exerted over the owner-drivers by the company than in the instant case. There is no indication in *Seven Eleven Taxi*, for example, that the owner-drivers had to report on the air at a particular time in the morning if they wanted to work the day shift or that there was a limit to the number of shifts they could work. As well, there is no suggestion that, at other times, to insure a sufficient number of cars on each shift, Seven-Eleven Taxi Ltd. might have required owner-drivers to operate their cars either by driving an extra shift themselves or by putting drivers on their cars. Furthermore, the Board in *Seven-Eleven Taxi* did not have before it evidence of a substantial scheme of rules and discipline as was established in the instant case. Evidentiary differences such as these readily distinguish *Seven-Eleven Taxi* from the instant case. In the Board's view Manson's relationship with Niagara Veteran Taxi may be compared more closely to the circumstances of the owner-drivers in *Blue Line Taxi*, *supra*, a case in which the Board distinguished *Seven-Eleven Taxi* and concluded that the persons in question were dependent rather than independent contractors.

17. For the reasons set out above, therefore, the Board is satisfied that William Manson is a dependent contractor within the meaning of section 1(ga) of *The Labour Relations Act* and, therefore, having regard to the provisions of section 1(gb) of the Act, an employee for the purposes of the Act.

18. Manson testified that he only occasionally hires drivers to operate his taxi during his non-working hours. Such an irregular use of an extra driver is not sufficient for the Board to conclude that Manson is engaged in an entrepreneurial activity and does not therefore detract from his status as an employee. This conclusion is also consistent with the Board's decision in *Blue Line Taxi*.

19. The employer's preliminary objection to the section 79 complaint based on the contention that Manson is not an employee under the Act is therefore dismissed. The Board will hear the complaint on its merits.

1846-79-U Hotels, Clubs, Restaurants & Tavern Employees' Union Local 261, Complainant, v. Boretos & Tsotsos, Carrying on Business as Nicholson's Restaurants, Steak House & Tavern, Respondent.

Duty to Bargain in Good Faith – Section 79 – Whether earlier settlements of discharge complaints relevant – Whether earlier unlawful conduct tainting negotiations – Both sides engaging in hard bargaining

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Alick Ryder, Q.C. and Frank Grella for the complainant; H. W. Shaw for the respondent.*

DECISION OF THE BOARD; March 19, 1980

1. The Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261 has complained to the Board that the respondent, Nicholson's Restaurants, Steak House & Tavern, has violated the provisions of section 14 of *The Labour Relations Act*. That section defines the duty to bargain and provides:

“The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make very reasonable effort to make a collective agreement.”

2. The obligation imposed by section 14 to “bargain in good faith and make every reasonable effort to make a collective agreement” requires that the parties meet for the purposes of collective bargaining and participate in full discussion of the matters in issue. As has been pointed out by the Board in a number of cases, the necessity to participate in full and reasoned discussion of bargaining differences lies at the centre of the obligation to bargain in good faith (see *The Journal Publishing Company of Ottawa Limited and L. A. Lalonde*, [1977] OLRB Rep. June 309; *Canadian Industries Ltd.*, [1976] OLRB Rep. May 199; *St. Joseph's Hospital*, [1976] OLRB Rep. June 255). In elaborating on the obligation to engage in rational communication, the Board has stated that the union is entitled to know an employer's rationale for its position on the compensation offer (see, for example, *St. Joseph's Hospital, supra* and *Pineridge District Health Unit*, [1977] OLRB Rep. Feb. 65.)

3. While an employer may be required to apprise the union of its rationale for its position, there is no requirement imposed by section 14 that the employer make particular concessions. The right for a union to engage in collective bargaining is not a guarantee that a union will obtain a collective agreement. Except to the extent that bargaining demands are themselves illegal, the Board is primarily concerned with the manner in which negotiations are carried out rather than the content of the demands themselves. As pointed out most recently by the Board in *Radio Shack*, (File No. 1004-79-U decision dated December 5, 1979, as yet unreported), bargaining demands aimed at undermining the union by fostering dissension can constitute a violation of section 14 as well as sections 56, 58 and 61 of the Act. In *Radio Shack, supra*, for example, the Board concluded that the respondent's rigid position

on union security, as well as other central issues, were designed to avoid a collective agreement and aimed at undermining the trade union.

4. In *The Daily Times*, [1978] OLRB Rep. July 604, the Board discussed the earmarks of "surface bargaining" which describes the type of bargaining where a party goes through the required motions but does not intend in fact to conclude a collective agreement. In distinguishing hard bargaining from surface bargaining, the Board stated at paragraph 15,

"The parties to collective bargaining are expected to act in their individual self-interest and in so doing are entitled to take firm positions which may be unacceptable to the other side. The Act allows for the use of economic sanctions to resolve these bargaining impasses. Consequently, the mere tendering of a proposal which is unacceptable or even 'predictably unacceptable' is not sufficient, standing alone, to allow the Board to draw an inference of 'surface bargaining'. This inference can only be drawn from the totality of the evidence including, but not restricted to, the adoption of an inflexible position on issues central to the negotiations. It is only when the conduct of the parties on the whole demonstrates that one side has no intention of concluding a collective agreement, notwithstanding its preservation of the outward manifestations of bargaining, that a finding of 'surface' bargaining can be made."

5. In this case, the union contends that the employer has engaged in surface bargaining. Its counsel submits that the evidence, viewed in its entirety, demonstrates that the employer has sought to undermine the union and has no intention of ever reaching a collective agreement.

6. The union's application for certification was filed November 3, 1978. A few days later one of the employees who initiated the union organizing effort was discharged. As well another employee, also involved in the initial contact with the union, was told not to return from lay-off. Complaints under section 79 of the Act were filed by the union and were ultimately settled. The Board cannot, therefore, look to those discharges as establishing anything for the purposes of these proceedings. In the certification application in December 1978, the Board found that a petition filed in opposition to the application for certification was not a voluntary expression of desire on the part of the employees. At the instant hearing, Nick Boretos, the president of the respondent, admitted that his partner, Ted Tsotsos, had questioned employees about whether or not they had signed membership cards in the union. He admitted that both he and his partner had been interested in finding out who had signed membership cards, but stated that they didn't know that it was an improper inquiry until they were so cautioned by a friend. The petition being rejected, a certificate issued to the union.

7. In January, 1979, the union held a meeting of employees in the Pembroke Legion Hall to discuss contract proposals. It is common ground between the parties that Boretos stationed himself in his car across the street from the Hall for approximately fifteen minutes with the intention of watching who went into the Hall. Boretos maintains that he did not realize that what he was doing was wrong. He testified that he had not read the Board's certification decision in which it dismissed the petition because he cannot read English. He stated

that while his lawyer explained the certification decision to him, he understood some parts of it but didn't understand everything.

8. Three negotiation meetings were held between the union and the employer during the months of February and March, 1979. During the meetings Eleanor S. Dunn, business representative of Local 261, represented the union along with another individual and Nick Boretos and his lawyer, Mr. L. P. LaFrance, represented the employer. The evidence indicates that the actual negotiation took place largely between Dunn and LaFrance. The union admitted that it had no difficulty arranging the meetings with the employer and that discussions were at all times carried out in a courteous fashion.

9. At the first meeting on February 7, 1979, the union presented its proposals clause by clause; the employer agreed with some and disagreed with others. It quickly became apparent that the significant bargaining differences were over seniority, union security and wages. With respect to union security, the employer refused to go beyond the requirements of section 36a of the Act requiring the employer to deduct union dues from wages for those employees who have indicated in writing to the employer their desire to have such a deduction made. Regarding seniority, the employer agreed to its application for vacations but not for such matters as hours of work or lay-off. The Board is satisfied that through the meetings progress was made in reaching agreement on the seniority issue through the use of a letter of intent proposed by the union. The Board is satisfied on the evidence that by the last meeting the content of the letter of intent was agreed to though not the precise wording or the timing.

10. In response to the union's wage demands, the employer from the outset indicated that it was not prepared to give any wage increase. During the February 7th meeting the union requested the employer to provide a list of employees by classification and current wage rates. The employer complied with this request orally and further indicated, at the union's request, which employees had received wage increases on January 28, 1979 and what those increases were.

11. At the second negotiation meeting on February 21, 1979, the employer supported its position on wages by providing for the union percentage figures showing the decline in sales it had experienced from September, 1978 through February, 1979. The employer stated that in September its level of sales declined thirteen per cent, in October seventeen per cent, in November twenty-eight per cent, and in January and February fifty per cent. The union complained that it had no means of verifying these figures and that it was never given either the figures in writing or an audited financial statement or the restaurant's financial books. The evidence clearly demonstrates, however, that the union never requested anything in the way of documents or books from the employer to substantiate the assertion that the employer's business had declined drastically. The employer's evidence that its business was in decline during the period of negotiations is supported by the uncontradicted evidence of Boretos that the union imposed a boycott against the restaurant in the second week of November, 1978 and that the boycott has persisted throughout the negotiations. Dunn acknowledged that the union had sought the support of other union members in the Pembroke area in a effort to boycott the employer's restaurant. Boretos testified that he was not prepared to give any wage increase whatsoever unless his business improved.

12. Wage increases were given by the employer to some employees on January 28, 1979. In November Dunn reported the employer to the Ministry of Labour indicating the

union's belief that the employer was not paying wage rates consistent with minimum wage standards. The Board accepts the evidence of the employer that someone from the Ministry of Labour came to see him on or about January 25th and told him that he would have to increase the wages of some employees to meet the minimum wage standards. They went through the restaurant's books together and the Ministry's officer pointed out who should be given a wage increase. Dunn gave evidence that certain employees were given wage increases over and above the amount necessary to reach the minimum wage standard. That was partly denied by the employer. It is common ground between the parties, however, that at least one individual, Boretos' daughter, was given a fifty cent increase on January 28th, which was not required by the Ministry of Labour. The union advised the Board that it seeks no redress of the possible breach of section 70 of the Act in this complaint, having indicated its reluctant acceptance of the increase in the course of negotiations in an effort to attain harmonious relations with the respondent.

13. The parties broke off their negotiations after the meeting of March 22, 1979. The break occurred because the employer was not prepared to change its position on either union security or wages. In June, 1979, the union applied for the assistance of a conciliation officer. A short meeting was held, following which the Ministry issued a no Board report in late June or early July. In early September the union applied for the assistance of a mediator. Although Mr. Boretos testified that he was never contacted by a mediator and never received any communication by letter or phone, the Board is satisfied on the evidence that the mediator was in fact appointed. It would appear that the primary contact might have been made with the employer's lawyer, who at the time of the hearing was out of the country and could not clarify that point.

14. Dunn testified that she was at all times prepared to meet with the mediator. When the mediator phoned her on December 12th or 13th with the message that no meeting would take place, she filed the instant complaint.

15. Counsel for the union argues that the employer's position on union security and wages, when viewed in the context of its pre-negotiation conduct, demonstrates the employer's design to destroy the union. Counsel emphasized that the employer never offered the union a document containing the terms of an agreement which it would be willing to sign. Counsel argued that while the employer's failure to tender an offer in a legal form capable of being accepted by the union, would not in itself point to bad faith bargaining, in the overall context of the case it demonstrates that the employer was not prepared to sign a collective agreement even if the union had been willing to accept all of its terms. Counsel further asserted that the most evidence of the employer's bad faith bargaining is that the justification for the employer's unwillingness to give a wage increase is undermined by the fact that he gave a wage increase not required by law to one member of the bargaining unit, his daughter, prior to the onset of negotiations. Counsel asked the Board to conclude from this evidence that the employer was willing to give wage increases but not willing to give them within the framework of bargaining.

16. The pre-negotiation conduct which the Board can consider in interpreting the employer's conduct during negotiations is comprised of the employer interrogating the employees as to whether they had joined the trade union and the employer stationing his car outside a union meeting to watch who attended. While these acts would, *prima facie*, indicate an interference with the administration of the union contrary to section 56 of the Act, they are

not of themselves breaches of the section 14 duty to bargain in good faith. The question is to what extent these acts lend colour to the employer's subsequent conduct in bargaining.

17. It is clear that the employer wrongfully questioned the employees to determine whether or not they were union members. Although the employer misconducted himself that way and also acted improperly in stationing his car outside the hall where the union was holding its meeting, the Board, in the context of the entire relationship, concludes that these activities, however reprehensible, do not taint the subsequent negotiations. Apart from the wage increase over and above that required by law given to the employer's daughter, which would appear to be a violation of section 70 of *The Labour Relations Act*, there is no indication that the employer sought to bargain separately with the employees or engaged in conduct tantamount to a refusal to recognize the union.

18. Having evaluated the negotiations themselves, the Board is unable to find that the employer has acted contrary to its obligation under section 14 of the Act. Although the employer would not alter its stance taken at the initial negotiation meeting that it would not give any wage increases, the union agrees that the problem was thoroughly discussed. The employer presented figures to the union to justify its position. Although the union argued at the hearing that the figures were not sufficient to enable it to adequately evaluate the merit of the employer's position, the union never asked for any additional financial data to assist in its evaluation. The Board cannot avoid the conclusion that the union was itself responsible for a measure of the employer's intransigence on the wage issue. Boretos' evidence, uncontradicted by the union, was that the union imposed a boycott on the respondent's restaurant in November, 1978. The boycott, enforced as it was both before and during the negotiations, was hardly conducive to persuading the employer to increase wages. While the evidence demonstrates that the employer gave one employee a wage increase beyond that required by law, the Board cannot conclude from this single incident that the employer was not willing to reach a collective agreement. While the wage increase may have been improper, the Board does not view it as being motivated by a desire to undermine the union or to frustrate negotiations, nor did it have that effect.

19. Although the parties have not met since June, 1979 to negotiate, the Board does not view this failure to meet as reflective of an intention on the employer's part not to reach a collective agreement. Although the evidence indicates that the employer is responsible for the fact that there was no meeting with the mediator in December, 1979, the Board has no evidence from which it can draw a conclusion as to whether the employer was unable to meet at that time or unwilling to meet at that time. Even if, however, the employer did refuse to meet, this would establish evidence of only a single refusal on the employer's part. Mediation at this state in negotiations is a voluntary process and the Board is unwilling to draw the conclusion that a single refusal on the employer's part to meet with the union and mediator reflects an intention on the employer's part not to reach a collective agreement. The union presented no evidence to suggest that it made any other requests to meet which were refused.

20. On the basis of all the evidence, therefore, and for the reasons set out above, the Board concludes that the employer has engaged in hard bargaining rather than surface bargaining. The Board, therefore, does not find that the employer has violated its obligation to bargain in good faith under section 14 of the Act. The complaint is, accordingly, dismissed.

CONCURRING DECISION OF BOARD MEMBER O. HODGES:

1. The law does not require the employer to sign a collective bargaining agreement. When agreement is not reached on issues the trade union requires as part of a settlement, the union members are required to strike to enforce their demands. In this instance it appears that a strike is the only recourse open to the union.
2. The boycott imposed by the union during bargaining appears to have reacted against the union, inasmuch as the ability of the employer to meet wage demands would have been adversely affected by the success of the boycott. However true that may be, tactics are decided by the participants, so long as they are not unlawful. It could be that the trade union would have been in a stronger position had it encouraged the patronage of the restaurant and tavern by area union members during bargaining, thereby improving the bargaining climate and encouraging a settlement. An influx of area union members as new customers would probably have been good for the morale of the union members on the premises as well.
3. This unhappy matter is surely a demonstration of the positive value an arbitrated first agreement settlement would have for all concerned, and I would have ordered a first collective agreement be arbitrated in these circumstances were it within my authority to do so. However, considering all of the evidence and in the circumstances of this case, I am obliged to concur in the decision to dismiss the complaint.

1131-79-M Office and Professional Employees International Union, Local 343, Applicant, v. **Ontario Secondary School Teachers' Federation**, Respondent.

Employee – Regular duties requiring employee to provide collective bargaining data for use by employer – Data not confidential – Whether employee employed in confidential capacity

BEFORE: R.O. MacDowell, Vice-Chairman and Board Members O. Hodges and F.W. Murray

DECISION OF THE BOARD; March 24, 1980

1. This is an application under section 95(2) of *The Labour Relations Act*. The applicant seeks a determination of the employee status of Ms. Valerie Hunnius. The respondent contends that Ms. Hunnius is employed in a confidential capacity in matters relating to labour relations and should, therefore, be excluded from the bargaining unit, pursuant to the provisions of section 1(3)(b) of *The Labour Relations Act*. Section 1(3)(b) of the Act provides as follows:

“(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.”

2. The purpose of section 1(3)(b) of the Act is to ensure that persons who are within a bargaining unit do not find themselves faced with a conflict of interest, as between their responsibilities and obligations as persons who “exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations” and their responsibilities and obligations as members of the unit. Collective bargaining, by its very nature, requires an arm’s length relationship between the “two sides” whose interests, objectives and priorities are often divergent. Persons employed in a confidential capacity relating to labour relations are regularly involved with information and matters which, if disclosed, would adversely affect the collective bargaining interests of the employer. Section 1(3)(b) ensures that the employer need not be concerned that such persons will have “divided loyalties.”

3. Section 1(3)(b) involves three separate criteria: the disputed individual must be employed in a confidential capacity; the material with which that individual works must be confidential; and the material must be related to labour relations. The Board summarized its approach to these criteria in *York University*, [1975] OLRB Rep. Nov. 945 at page 951:

“... the Board must be satisfied of ‘a *regular, material involvement* in matters relating to labour relations’ to justify a finding excluding a person from operation of the Act. (See *The Falconbridge Nickel Mines Ltd.* case, [1969] OLRB Rep. September 379.) Mere access to confidential information that may pertain to labour relations, standing alone, is no reason for excluding employees from the bargaining unit. (*The Metropolitan Separate School Board* case, [1974] OLRB Rep. Apr. 220.) Nor is mere knowledge of matters that may be deemed ‘confidential’ in the sense that the employer would not approve of the disclosure of such information by his employee sufficient to justify a positive finding under section 1(3)(b). (See *The Comtech Group Limited* case [1974] OLRB Rep. May 291.) The important test is whether there is a *consistent exposure* to confidential information on matters relating to labour relations so as to constitute such exposure an integral part of the employee’s service to the employer’s enterprise. (See *The Toledo Scale Division of Reliance Electric Limited* case [1974] OLRB Rep. June 406.)” [Emphasis added]

4. The handling of collective bargaining information must be at the core of the disputed individual’s job functions. An occasional, or peripheral, involvement is insufficient to justify his exclusion. As the Board observed in *Falconbridge Nickel Mines Ltd.*, [1966] OLRB Rep. Sept. 379:

“A person to be excluded under this provision must be employed ‘in a confidential capacity’, i.e., such capacity must be part of his regular duties. An accidental or isolated involvement in some aspect of labour relations is not sufficient, in our view, to exclude a person from collective bargaining. However, a regular material involvement in matters relating to labour relations which are confidential because their disclosure would adversely affect the interest of the employer would exclude a person pursuant to the provisions of section 1(3)(b) of the Act. As can be readily seen, the degree of the involvement and the extent of the con-

fidential nature of the matters dealt with become important factors to be considered in determining exclusions under these provisions.”

5. In each case the Board must determine the individual's duties and responsibilities at the time of the application. It is not sufficient that those responsibilities are contained in a job description unless there is some evidence that the description accurately describes the job and the way it is being performed. It is recognized, of course, that if the position is a newly-created one, or if the incumbent has been only recently promoted, it may be that occasions have yet to arise when certain functions are performed. If such is the case, it may be that the request to the Board is premature. As the Board noted in *Windsor Transit*, [1979] OLRB Rep. Mar. 262, organizations and systems of management can change. Over time, the degree and focus of decision-making power can be altered. However, the Board is restricted in its determination to the situation, as it exists, at the time of the application, not as it might become some time later. If there is a material change in an employee's duties and responsibilities, or if those responsibilities “evolve”, either party is entitled to make application, under section 95 of *The Labour Relations Act*, for a clarification of the employee's status. We should repeat, however, that a party asserting that an individual is employed in a confidential capacity in matters relating to labour relations, must affirmatively demonstrate that this participation is at the core of the employee's job responsibilities and that the employee is regularly, and materially, involved in the labour relations process. The evidence must demonstrate more than an incidental, or isolated, involvement in employer-employee relations.

6. The respondent is the designated collective bargaining representative for Ontario's secondary school teachers. Ms. Hunnius has been employed by the respondent, in various positions, since February, 1972. In or about June, 1979 she was advised that her position of “information officer” was being eliminated and that she would be offered continued employment in a newly-created position entitled “Research Officer.” The Research Officer would report to Dr. Lecuyer, the associate general secretary of the respondent; however, no firm determination had been made concerning the duties and responsibilities associated with the new position. It was expected that the job would “evolve” and would be subject to an on-going, functional review. When Dr. Lecuyer gave his evidence, in December, 1979, he explained that the position was still largely an undeveloped concept. He envisaged various responsibilities, which might be undertaken by the Research Officer, but he candidly indicated that his views were somewhat speculative, and based upon his own view of the respondent's needs. The position was still in a state of flux, almost six months after its creation. It is clear, however, that prior to the present application there was no affirmative decision taken to employ the “Research Officer” in a confidential capacity in matters relating to labour relations. Ms. Hunnius had not been specifically so advised, although she had raised the matter at a meeting with Dr. Lecuyer, Ken McLaren, the respondent's Personnel and Office Manager and Mr. Richardson, the respondent's General Secretary.

7. Ms. Hunnius was appointed to the disputed position in or about July 1st. Thereafter, she undertook various assignments, including an appraisal of a British study comparing teachers' salaries with those of civil servants. The present application was filed on September 12th, 1979. By letter dated September 14th, 1979 the Registrar of the Board advised the respondent of the application. On September 19th, 1979 Ms. Hunnius was given the first assignment which, the respondent now contends, demonstrates that she is employed in a confidential capacity relating to labour relations. A Labour Relations Officer was appoint-

ed, on October 29th, 1979 and a hearing before the Officer was scheduled for November 19th. On November 9th, 1979 the respondent produced its first formal job description, which was eventually presented to the parties herein at the hearing before the Officer on December 5th, 1979. This sequence of events illustrates the principal difficulty faced by the Board in cases such as this. The Board is asked to make a determination of employee status in a dynamic situation based upon evidence which can be neither complete nor conclusive.

8. On September 19th, 1979 Ms. Hunnius was asked to prepare a summary of general information concerning office employee benefits, including leaves of absence, hours of work and pension schemes. On September 21st, 1979 she was asked to survey professional development and evaluation practices for secretarial and clerical staff. In neither case was she specifically advised that this information would be used by the respondent for collective bargaining purposes; however, since negotiations were then in progress, the information was to be given to Ken McLaren, and was described as "confidential", Ms. Hunnius correctly concluded that the information might be used by the respondent at the bargaining table. It is these two incidents which, the respondent contends, justify the Board in concluding that Ms. Hunnius is employed in a confidential capacity in matters respecting labour relations. It should be noted, however, that Ms. Hunnius' role was restricted to gathering publicly available data on the practices of other employers. There is nothing confidential in the information itself, nor did Ms. Hunnius have any input into how the information was used. No specific comparisons were made between the respondent's employees and those of other employers; nor did Ms. Hunnius' report include any recommendations. Ms. Hunnius did not participate directly, or indirectly, in the respondent's collective bargaining process. There were no meetings to discuss the use of the information which she had gathered, nor had she any access to the employer's bargaining strategy or discussions concerning its bargaining position. She has no access, or information, concerning the employer's budget-making process or other managerial decision-making which could bear upon collective bargaining. She has no participation in the grievance procedure. She may, at some point in the future, have a role to play in respect of the respondent's ongoing review of its office organization; but the evidence in this regard is far from clear and conclusive. There is no evidence that, at the present time, Ms. Hunnius has access to confidential personnel records, or has any specific, confidential information concerning future re-organization plans which might have some impact on the bargaining unit and which, if disclosed, would adversely affect the collective interests of the employer.

9. On the basis of the evidence before us, we cannot conclude that, at the present time, Ms. Hunnius is regularly and materially involved in matters relating to labour relations. On the contrary, the evidence suggests that her involvement in collective bargaining is peripheral, and merely incidental, to her general duties and responsibilities. We are not satisfied, therefore, that at the present time, she must be excluded from the collective bargaining process pursuant to section 1(3)(b) of *The Labour Relations Act*.

1880-79-M International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Applicant, v. Per-fec-tion Insulations Limited, and R. N. Flynn Insulations Limited, Respondents.

Arbitration – Parties – Section 112a – Union seeking dismissal of non-union employees – Whether employees entitled to notice of proceedings – Whether employer association entitled to notice

BEFORE: Rory F. Egan, Vice-Chairman, and Board Members E. C. Went and S. H. Lewis.

APPEARANCES: *S. B. D. Wahl and L. Duffy for the applicant; R. A. Werry for the respondents.*

DECISION OF THE BOARD; March 17, 1980

1. The applicant has referred a grievance to arbitration under section 112a of *The Labour Relations Act*.
2. The applicant alleges that the respondents are in breach of the provisions of a collective agreement effective from May 14, 1979 until April 30, 1980 made between The Master Insulators' Association of Ontario, Incorporated and International Association of Heat and Frost Insulators and Asbestos Workers Local 95.
3. The grievance alleges, *inter alia*, that the respondents failed or refused to: employ persons who are members in good standing of the union and to hire persons through the union office.
4. The respondents submitted at the commencement of the hearing that The Master Insulators' Association of Ontario, Incorporated ought to be given notice of these proceedings as an interested party. The respondents further argued that the employees hired by the respondents ought to receive notice since their employment might be jeopardized as a result of the arbitration.
5. The applicant submitted at the hearing that the collective agreement applicable to the situation is one dated May 1, 1975, which incorporates the terms of an agreement between the International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 and The Master Insulators' Association of Ontario, Incorporated. As a consequence, it was submitted, The Master Insulators' Association of Ontario, Incorporated is not a party to the collective agreement under which the grievance is filed.
6. It is a matter of record that on April 28, 1978 the Minister designated The Master Insulators' Association of Ontario, Incorporated as the employer bargaining agency to represent in bargaining all employers whose employees are represented by, *inter alia*, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95. On the same date the Minister designated International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 as the employee bargaining agency to represent in bargaining all journeymen and apprentice insulators and asbestos workers represented by, *inter alia*, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95.

7. In Board File No. 1945-79-R the Board found in a decision dated November 1, 1979, that the respondents, who were the same as these named herein, were bound by a collective agreement covering the Province of Ontario between International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, the applicant herein, and The Master Insulators' Association of Ontario, Incorporated. That agreement was effective from July 7, 1975 to April 30, 1979. A like agreement effective from May 14, 1978 to April 30, 1980 was filed at this hearing by the applicant, reference to which was made earlier in this decision.

8. On the basis of the foregoing and the Board's decision of November 1, 1979 referred to above, the parties hereto are bound by the collective agreement between Local 95 and The Master Insulators' Association, effective May 14, 1978 to April 30, 1980.

9. Furthermore, in the Reply to the application the respondents raise a question as to whether the work in question is covered by the collective agreement. That broad matter being in issue, the Board finds that in any event The Master Insulators' Association of Ontario, Incorporated is an interested party which ought to be given notice of these proceedings.

10. It is also apparent that certain employees named in the Reply are liable to be adversely affected by the decision made on the arbitration. The applicant opposed the submission of the respondent that the employees of the respondent be given notice of these proceedings on the grounds that the dispute lies directly between the applicant and the respondent and that the interests of the employees would only be incidentally affected by the arbitration decision. The applicant referred to the decision of the Board in *Napev Construction Limited*, [1976] OLRB Rep. March 109 in support of its submission. The foregoing decision, however, dealt with the case of an attempt by a union representing employees of a sub-contractor to be added as a party to proceedings between the general contractor and a union representing the latter's employees. The Board refused to add the bargaining agent for the employees of the subcontractor on the basis of the rule of common law that a person who would only be commercially or incidentally affected by a decision is not entitled to be added as a party.

11. In the present instance, however, the employees of the respondent are liable to be directly and adversely affected by the result of the arbitration. Their interest is personal and immediate. The applicant union is entirely adverse in interest to the employees so that the employees would be left without representation in a situation where their jobs are in jeopardy if the union's position is upheld.

12. In *J. A. Wotherspoon & Son Ltd. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America Local 1256*, (1972), 25 D.L.R. (3d) 70 the Court in dealing with the question of failure to give notice to any person whose rights may be affected stated:

"... Failure to give notice to a party does not necessarily constitute a lack of jurisdiction invalidating the whole award but it does render the award null and void *ab initio* against any worker whose past or future rights might be affected by the award and who has not had proper notice. One might very well say that an arbitrator has no jurisdiction to make the award binding against any such person ..."

13. The right of an employee not otherwise a party to an arbitration to receive notice of the proceedings if his job or his employment status is in jeopardy is similarly upheld in *Hoogendorn and Greening Metal Products and Screening Equipment Co. et al.*, (1967), 65 D.L.R. (2d) 641 and *Re Bradley et al. and Ottawa Professional Fire Fighters*, (1967), 63 D.L.R. (2d) 376.

14. In light of the foregoing the Board finds that notice of these proceedings ought to be given to the employees of the respondent involved in the work in question.

15. The Board accordingly directs the Registrar to ascertain from the respondent the names of the employees concerned and to serve notice of these proceedings on those employees.

1486-79-R; 1796-79-U Canadian Union of Public Employees, Applicant v. Rygiel Home, Respondent.

Certification – Representation Vote – Whether company propaganda unduly influencing employees – Whether Board setting aside vote results

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Mario Hiki and Peter Douglas for the applicant; Philip J. Wolfenden and Janice Johnston for the respondent.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL;

1. The name of the respondent is amended to read: "Rygiel Home".
2. This is the continuation of an application for certification, together with a related complaint under section 79 of the Act. As the two matters raise the same issue, the Board has dealt with them on a consolidated basis.
3. In a decision dated November 19, 1979, the Board ordered a pre-hearing representation vote to be held amongst the employees in the voting constituency. That vote took place at the Home on December 6, 1979, and resulted in a 60-60 tie. Since the union failed to win majority of the votes cast, the tie normally would result in the union's application for certification being dismissed. The union, however, now seeks to have the results of that representation vote set aside.
4. The union requests in the first instance that the Board exercise its discretion under 7a of *The Labour Relations Act* and certify it outright. In the alternative, the union asks the Board to direct the holding of a second representation vote. As a final alternative, in the event that the application for certification must be dismissed, the union asks the Board to re-

frain from following its usual practice of imposing a six-month bar to a further application for certification by the applicant.

5. The grounds upon which the union relies arise out of the settlement, prior to the vote, of a section 79 complaint filed by the union with respect to the discharge by the Home of an employee named Robin DiValentino. The main points of this settlement were that Mrs. DiValentino would not be reinstated, but would receive from the Home a certain sum of money characterized as "damages". The Home expressly denied any admission of liability in the Minutes of the aforesaid settlement. Most germane to the present issue, however, is paragraph 4 of the Minutes of Settlement, which reads as follows:

"The Union, the Grievor and the Rygiel Home agree that no notices will be written or circulated, save for Schedule "B" attached hereto, nor any oral communication be made to members of management or employees of the Rygiel Home, that would indicate a victory or defeat for either of the parties to this settlement pending the completion of the representation vote to be held on December 6th, 1979."

Schedule "B" reads:

"On November 28, 1979, the Rygiel Home, C.U.P.E. and Robin DiValentino reached a settlement respecting the complaint before the Ontario Labour Relations Board.

Ms. DiValentino agreed to resign from her employment, the Rygiel Home agreed to pay her a cash settlement and C.U.P.E. agreed to the withdrawal of the complaint."

6. The union complains that the Home violated the undertaking set out in paragraph 4 in that it issued to employees a campaign letter dated December 1st, 1979, which contained the following material paragraphs:

"Thirdly, you no doubt have been hearing repeatedly from the Union about how 'we, the Union, are the only ones who can provide you with job security'. Do not be fooled. This is just an attractive catch-phrase all Unions use in their attempt to attract new members. Rather than deal with such catch-phrases, the Home would ask you to consider the facts. We are undoubtedly operating the best facility of its kind in Canada, if not North America. We should all be proud of the reputation we have built for our Home. So long as we continue to provide the quality of service we have been, for our residents, we will continue to have parents who want their children to stay with us. In other words, you create and control your own job security every day, by the way you perform your job functions and care for our residents.

You all know this Home has an excellent record on this issue. we have never discharged or disciplined an employee in a discriminatory or unfair way. The Union suggests in one of its bulletins that Robin DiValentino was let go because of what it called 'victimization'. We ask you to

consider, if this was so, why did so many of your fellow employees voluntarily come forth and agree to testify at the Labour Board in support of the Home's position? We believe it is because they too care about the Home and know that the Home's decision was not only a fair one, but the right one."

7. The union concedes that the Home's letter was generally restrained and innocuous, with the single exception of the second paragraph quoted above. That paragraph it alleges to be a clear violation of paragraph 4 of the Minutes of Settlement.

8. In support of its section 79 complaint and request under section 7a of the Act, the Union claims that the employer's conduct, referred to above, constitutes a violation of section 56 of the Act. That section reads as follows:

"No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, promises or undue influence."

The union relies in particular on the closing words of the section dealing with "undue influence". The union claims that the impugned paragraph would surely have influenced employees in the way they voted, and that such influence was "undue" because it was a violation of the self-imposed restrictions contained in paragraph 4 of the settlement. A prior bulletin issued by the union did indeed refer to the firing of Mrs. DiValentino as "a clear case of victimization", but the union argues that the Home lost all rights to respond to that charge when on November 28th it signed the Minutes of Settlement, with full knowledge of the union's prior bulletins.

9. The employer takes the position that there was nothing in its letter of December 1, 1979 that was misleading or improper or in violation of the Minutes of Settlement, and that in any event the union is now prevented from raising this matter as a result of having signed the Board's waiver of objections following the vote and prior to the counting of the ballots. On this latter point, however, the Board notes that the waiver of objections refers only to "the regularity and sufficiency of the balloting". Accordingly, it would not preclude the union from raising the present matter, which had nothing to do with the actual manner in which the vote was conducted.

10. In order to succeed in having the results of the vote set aside, the union must persuade the Board that the employees were somehow prevented from expressing their true wishes in the secret ballot. The Board finds (and indeed the union concedes) that the Home's letter of December 1, 1979, standing alone, would fall within the parameters of acceptable employer response to propaganda efforts by the union. For a broad statement of those parameters, see the Board's decision in *Alcan Building Products*, [1971] OLRB Rep. Dec. 806, especially at paragraphs 6, 7 and 8. In support of its position, however, the union argues that the Home's design in raising the renowned DiValentino case (and hence its set-

tlement) was to convey to employees the message that the union had been unable to protect one union supporter, Mrs. DiValentino, and would be unable to protect others as well.

11. The Board finds that the intimidating construction which the union seeks to place upon the paragraph in question, while imaginative, is not likely one which would have occurred to the employer or, more importantly, to the employees of the Home. As with most compromises, the terms of settlement or the section 79 complaint could arguably be put forward as a victory for either party, and it is precisely this sort of debate which the parties in paragraph 4 of the Minutes of Settlement sought to exclude. The Home, for example, ended up paying money as "damages" to an employee about whom it had taken the position that it had every right to discharge. The reference to the settlement alone, particularly as obliquely as here, would not in the Board's view necessarily impact one way or the other upon the other employees of the Home. There is, in fact, no reason to assume that such an oblique reference to the settlement would trigger in the minds of employees any more than a recollection of the notice which was posted (Schedule "B"), and which both parties had agreed was a neutral statement of the settlement.

12. The union's position that there was a violation of the Minutes of Settlement really depends on the Board finding, as counsel for the union has urged, that the parties had agreed that they would approach the vote without *any* reference to the DiValentino case. Though the union may have preferred such an agreement, these are not the words to which both parties subscribed their signatures in the settlement. What was proscribed was, specifically, any communication "that would indicate a victory or defeat for either of the parties to this settlement". We do not find the Home's letter, and in particular the paragraph in dispute, to be in breach of this agreement. Nothing contained in that paragraph can be said to be dependent upon that settlement for its support. The entire paragraph could have been written in precisely the same terms had the settlement not taken place. While reference to the DiValentino case, in point of fact, may well have been equivalent to a reference to the settlement itself, there is, as the Board had indicated, nothing in the employer's letter which would indicate that the settlement was a victory or a defeat for either party. We find that it would have been open to the union to respond to the Home's reference to the DiValentino case in the same manner, and the union did not suggest at any time during the hearing that it was denied the opportunity to do so.

13. The union argues further that the paragraph to which it objects was misleading in its reference to "so many of your fellow employees" voluntarily coming forth and agreeing to testify at the Labour Board in support of the Home's position. The Board has no evidence on which to determine whether or not this statement is true, or is in any way misleading. But more importantly, it is simply a statement of fact, the accuracy of which employees could, with little difficulty, ascertain for themselves prior to the vote. See again the *Alcan Building Products* case, *supra*.

14. For the above reasons, therefore, the union's request to set aside the results of the pre-hearing representation vote held on December 6, 1979 is denied, and the application for certification, together with the section 79 complaint, are hereby dismissed. The only remaining question is whether or not the Board ought to impose its usual six-month bar with respect to any subsequent application for certification brought by this applicant. With the rejection of the union's other submissions, the only ground remaining to support this request is the closeness of the vote. The employees' wishes having been fairly tested, however,

the Board is of the view that this is not sufficient ground to depart from its normal practice, and accordingly exercises its discretion to impose the usual bar.

15. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the respondent in the voting constituency within the period of six months from the date hereof.

16. The Registrar will destroy the ballots cast in the pre-hearing representation vote taken in this matter following the expiration of 30 days from the date of this decision, unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30-day period.

DECISION OF BOARD MEMBER O. HODGES:

1. I dissent.

2. The majority has taken a very narrow view of paragraph 4 of the Minutes of Settlement and the wording of the Home's offending letter. The majority's position is that there is nothing in the letter "that would indicate a victory or defeat for either of the parties to this settlement" and thus it does not constitute a breach of paragraph 4 of the settlement which prohibits any communication to that effect.

3. It is desirable that when interpreting and applying an agreement to restrict freedom of communication, a narrow rather than a wide approach should be taken. However, the majority's interpretation here has been too narrow. It ignores the purpose of the settlement, which was to eliminate electioneering on either side on this issue. An interpretation which is so narrow as to frustrate the purpose of a settlement provision must be rejected.

4. I find that the offending employer letter to employees can reasonably bear the construction placed upon it by the union. The circumstances of this case are that the discharge of Robin DiValentino, her subsequent complaint to the Board, and the resulting settlement are well-known among the employees of the Home. The majority's use of the description "the renowned DiValentino case" rightly indicates the significant impact that this one has had in the minds of the employees at the Home. In this context, the Home's reference to Robin DiValentino's discharge combined with their rhetorical question,

"... if this was ["victimization"] why did so many of your fellow employees voluntarily come forth and agree to testify at the Labour Board in support of the Home's position? We believe it is because they too ... know that the Home's decision was not only a fair one, but the right one",

is bound to be perceived by the average employee as an assertion of employer victory regarding that whole dispute, including the settlement. It seems incongruous for the Home to pointedly draw attention to employee support for its position in a dispute with the union if it did not at the same time intend to thereby claim victory over the union. Finally, the use of the words "so many" of the employees is biased and misleading and cannot be characterized as a statement of fact; clearly "so many" is intended to support the Home and to discourage employee support for the applicant union in the election only days away.

5. I do not see the relevance of the majority's statement that "nothing contained in that paragraph can be said to be dependent upon the settlement for its support." The question is not whether the settlement supports the Home's assertion. The question is whether the Home's statement indicates a victory in regards to the settlement. This statement claiming strong employee support for its position certainly would not be considered to be independent of the settlement in the employees' minds under these circumstances, and would be perceived as an assertion of victory over the union.

6. Thus I find the Home violated the undertaking set out in paragraph 4 of the Minutes of Settlement, and by doing so used undue influence constituting interference with a trade union contrary to section 56 of the Act. I further find that the negatively persuasive effect of the employer's undue influence has prevented the employees' wishes from being fairly tested and is sufficient to invalidate the representation vote in these circumstances where the vote was a 60-60 tie. The results of the pre-hearing representation vote should be set aside.

7. The question of what remedy to apply now arises. Here again I emphasize the closeness of the vote. Although I find that the union has failed to establish that "the true wishes of the employees . . . are not likely to be ascertained" by a vote and thus are not entitled to a section 7a certification, I do find that their true wishes are likely to be ascertained by a second vote held in an atmosphere where the employer is not seen to be claiming vindication in regards to the DiValentino termination. A second vote is preferable to exercising the Board's discretion not to impose the six-month bar to a further application for certification by the applicant for the simple reason that it will expedite the proceedings of this matter to have a second vote rather than begin again with a whole new second application for certification.

8. For the above reasons I would order that the results of the first vote be set aside and direct that a new representation vote be held.

1878-79-R Teamsters Local Union No. 647, Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **T.R.S. Food Services Limited**, Respondent, v. Hotel & Restaurant Employees' & Bartenders' International Union (affiliated with the CLC), Intervener.

Bargaining Rights – Certification – Collective Agreement – Whether voluntary recognition agreement to bar application by intervening trade union – Board treating certification application by intervener as also application under section 52

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. D. Bell and C. Ballentine.

APPEARANCES: *Ken Petryshen and Don Swait for the applicant; D. L. Black and L. W. Fowler for the respondent; Alick Ryder, Q.C. and Tom Reese for the intervener.*

DECISION OF THE BOARD; March 4, 1980

1. This is an application for certification by both the applicant and intervener unions.

• • •

4. This application raises two issues. First, the effect on the timeliness of the applicant's application of a voluntary recognition agreement entered into between the respondent and the intervener; secondly, the appropriate geographic scope of a bargaining unit in the food service industry.

5. The intervener raised the preliminary objection to the timeliness of the applicant's application. It argued that the applicant is barred from making this application by virtue of a voluntary recognition agreement entered into between the intervener and the respondent dated January 7, 1980. That is the same day the applicant filed its application for certification.

6. Section 5(3) of *The Labour Relations Act* provides that where the Board has not made a declaration under section 53 of the Act, a voluntary recognition agreement in writing and signed by the parties will operate to preclude another trade union from applying to the Board for certification as bargaining agent for any of the employees in the bargaining unit defined in the recognition agreement for one year from the commencement of the recognition agreement. Section 5(3) reads as follows:

“Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties and the parties have not entered into a collective agreement *and the Board has not made a declaration under section 52*, another trade union may, subject to section 53, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit

defined in the recognition agreement *only after the expiration of one year from the date that the recognition agreement was entered into.*"

[emphasis added]

7. The intervener adduced in evidence the voluntary recognition agreement concluded between itself and the respondent employer which reads as follows:

"MEMORANDUM OF RECOGNITION:

BETWEEN:

T. R. S. FOOD SERVICE LIMITED., hereinafter referred to as the "COMPANY",

– and –

HOTEL AND RESTAURANT EMPLOYERS AND BARTENDERS INTERNATIONAL UNION, affiliated with the CANADIAN LABOUR CONGRESS, hereinafter referred to as the "UNION".

WITNESSETH:

The company recognizes the union as the sole and exclusive bargaining agent for all employees of the company employed at the General Motors of Canada Plants, St. Catharines, Ontario, save and except supervisor and persons above the rank of supervisor.

The company further agrees to meet with said union for the purpose of negotiating a collective bargaining agreement covering the employees wages, hours and working conditions.

SIGNED AT OSHAWA, ONTARIO, THIS SEVENTH DAY OF JANUARY, 1980.

ON BEHALF OF THE COMPANY:

"L. W. Fowler"

L. W. FOWLER, Vice President Finance

ON BEHALF OF THE UNION:

"Thomas L. Rees"

THOMAS L. REES, International Organizer

8. The intervener does not dispute that the applicant's application for certification may be deemed to be an application under section 52 of the Act for a declaration that the intervener was not at the time the voluntary recognition agreement was entered into entitled to represent the employees in the bargaining unit. That is consistent with the Board's practice as reflected in *Trent Metals Limited*, [1979] OLRB Rep. Aug. 827, where the Board deemed an application for certification to be an application under section 52 to dispute the validity of a voluntary recognition agreement raised as a bar to the application. (See also, generally, *Genaire Limited*, 58 CLLC ¶15,388 (H. Ct.); aff'd 59 CLLC ¶15,147 (Ont. C.A.)).

9. We turn, therefore, to the applicant's request that the Board declare, pursuant to section 52 of the Act, that the intervener union was not entitled to represent the employees in the bargaining unit at the time that it entered into the recognition agreement. If the declaration is granted by the Board, the applicant argues, the voluntary recognition agreement could not then operate to bar the applicant's application for certification. The relevant provisions of section 52 read as follows:

“(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 3 of section 15, the Board may, upon the application of any employee in the bargaining unit or of a trade union representing any employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(3) On an application under subsection 1, the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection 1, the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.”

The applicant's contention that the intervener was not entitled to represent the employees in the bargaining unit is based on the undisputed fact that at the time the agreement was entered into the intervener represented only two employees in a bargaining unit of approximately 55. Counsel further argues that the voluntary recognition agreement should be struck down because it was entered into during a legitimate contest between two unions, citing *Trent Metals, supra*, as authority.

10. On a number of occasions the Board has considered what a trade union that is a party to a voluntary recognition agreement or a collective agreement based on voluntary recognition must show to establish that it was entitled to represent the employees in the bargaining unit at the time the agreement was entered into. In the *Operative Plasterers' and Cement Masons' International Association of the United States and Canada*, [1978] OLRB Rep. Apr. 362, an application was filed under section 52 of the Act for a declaration that the respondent was not entitled to represent the employees in the bargaining unit for which it had purported to act as bargaining agent. At page 367 the Board stated:

“In order to establish its entitlement to represent the employees in the bargaining unit of ‘all cements masons, foremen . . . in the Province

of Ontario' within the meaning of section 52(3), the respondent is required to prove that it represented a majority of the employees in the bargaining unit at the time of the execution of the alleged collective agreement. See the *Spring Plastering Limited* case, [1967] OLRB Rep. Dec. 887."

In *Spring Plastering Limited* the respondent union, facing an application under what is now section 52, filed membership evidence as of the time the challenged collective agreement was entered into on behalf of the vast majority of employees in the bargaining unit. At page 892 of its decision, the Board concluded on the basis of that membership that the respondent had satisfied the onus of establishing that it was entitled to represent the employees in the bargaining unit at the time the agreement was entered into. (See also *National Plastering Company Limited*, [1967] OLRB Rep. Dec. 876, where the Board found at page 877 that the respondent and intervener who were parties to a collective agreement flowing from voluntary recognition had failed to satisfy the onus upon them of establishing that the respondent union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into because the respondent did not at the time the agreement was entered into represent a majority of the employees in the bargaining unit.)

11. It is clear, as the foregoing cases show, that to establish its entitlement to have entered either a voluntary recognition agreement or a collective agreement based on voluntary recognition, a union must establish that it represented the majority of the employees in the bargaining unit at the time it entered into the agreement. In this case the intervener represented only two employees out of an approximately 55 employees in the bargaining unit at the time it entered into the voluntary recognition agreement with the employer. It has failed to establish, therefore, that it represented a majority of the employees in the bargaining unit at the time the recognition agreement was entered into. The Board, therefore, finds that it has not discharged its onus under section 52(3) of the Act. Accordingly, the Board declares, pursuant to section 52(1) of the Act, that the intervener was not entitled to represent the employees in the bargaining unit at the time the recognition agreement was entered into. Pursuant to section 52(4), therefore, the intervener forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement.

12. Counsel for the intervener argued that a declaration under section 52 of the Act does not have a retroactive effect. Instead, in counsel's submission, the declaration only operates to cancel the agreement from the time of the declaration forward. Pursuant to this reasoning, counsel contends that because the voluntary recognition was in existence at the time the application for certification was filed, it would operate as a bar to the applicant's application for certification, notwithstanding the Board's declaration that it is null and void.

13. If that argument obtains, section 52 of the Act becomes unduly technical and cumbersome to apply. It would only bifurcate proceedings to first require a union to launch a separate section 52 application to clear the way for a later application for certification. More importantly, it is contrary to common sense to suggest that if the intervener was not entitled to represent the employees when the recognition agreement was entered into that the agreement could still be raised as a bar to an application for certification by another union. Furthermore, such an interpretation is neither dictated by the words of section 52 nor in keeping with the Board's jurisprudence. In the *Operative Plasterers' and Cement Masons' International Association of the United States and Canada*, *supra*, the Board, following its

declaration that the union was not entitled to represent the employees in the bargaining unit at the time the collective agreement was entered into, stated that the alleged collective agreement never was a collective agreement and emphasized the inherent difficulties of attempting to secure a collective agreement in the construction industry by means of voluntary recognition. In *Trent Metals Limited*, *supra*, the Board determined at page 830 of its decision that the applicant was not entitled to represent the employees in the bargaining unit at the time the recognition agreement was entered into. The Board affirmed that the agreement could not bar the intervener's application.

14. A careful reading of section 5(3) indicates that the bar raised against an application for certification by a voluntary recognition agreement is predicated on the Board not having made a declaration under section 52. In this instance the applicant's application for certification has been deemed by this Board to be an application under section 52 of the Act. The Board has considered the representations of the parties and has declared pursuant to section 52 that the intervener at the time it entered the voluntary recognition agreement with the employer was not entitled to represent the employees in the bargaining unit. Accordingly, the Board further declared that the intervener forthwith ceased to represent the employees in the bargaining unit defined in the recognition agreement. Because the Board has made a declaration under section 52, the clear wording of section 5(3) stipulates that the bar that would otherwise be imposed by section 5(3) in the face of the recognition agreement does not apply.

15. In view of our determination that the voluntary recognition agreement does not bar the applicant's application for certification the Board now turns to consider the competing applications for certification by the applicant and intervener.

16. The respondent operates food service outlets in industrial plants and other institutions. With respect to both the full-time and part-time/student bargaining unit the applicant asks that the Board describe the geographic scope of the units by reference only to the municipality and not the particular client of the respondent whom the employees in question service, in this case, General Motors of Canada. The applicant's suggested description, therefore, reads "all employees of the respondent working in St. Catharines, save and except ...". The respondent on the other hand, asked the Board to describe the location where the employees work not by street address, but by the name of the client company. Accordingly, the respondent requests that the units read, "all employees of the respondent working in or out of the General Motors of Canada Limited plants in St. Catharines, save and except ...". The intervener takes no position on this question.

17. Given the novel nature of the issue in the food service industry, the Board requires further time for consideration. The Board has determined, however, that the applicant's and intervener's entitlement to certification in either the full-time unit or part-time and student unit cannot be affected by the Board's ultimate determination of the appropriate geographic scope for the two bargaining units. At the present time the respondent's only contract for food services in St. Catharines is at the General Motors Plants.

18. Having examined the membership evidence of the intervener for the full-time unit, the Board is satisfied on the basis of all the evidence before it that whether the bargaining unit encompasses the municipality of St. Catharines or is limited to the respondent's employees working in and out of the General Motor's plants in St. Catharines less than forty-

five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the intervener on January 17th, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purposes of ascertaining membership under section 7(1) of the said Act.

19. The application is dismissed with respect to the full-time bargaining unit for the intervener.

20. Regarding the membership evidence of the applicant, the Board is satisfied on the basis of all the evidence before it that no matter how the question of the geographic scope of the bargaining unit is ultimately resolved more than fifty-five per cent of the employees of the respondent in the full-time bargaining unit at the time the application was made, were members of the applicant on January 17th, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

21. Accordingly, the Board, pursuant to its discretion under section 6(1a) of the Act and pending the final resolution of the composition of the full-time bargaining unit certifies the applicant as the bargaining agent for all employees of the respondent working in or out of the General Motors of Canada plants in St. Catharines, Ontario, save and except supervisors, persons above the rank of supervisor, chefs, office and clerical workers, persons regularly employed for not more than twenty-four hours per week and student employed during the school vacation period.

22. A formal certificate must await the final determination of the appropriate bargaining unit.

23. Regarding the part-time and student unit, the Board is satisfied on the basis of all the evidence before it that no matter how the Board ultimately determines the geographic scope of the bargaining unit more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of both the applicant and the intervener on January 17th, 1980, the terminal date fixed for this application and the date which the Board determines under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. The ability of both the applicant and intervener to represent more than fifty-five per cent of the employees in the bargaining unit stems from an overlap of the membership evidence; some employees have joined both unions.

24. In view of these circumstances the Board exercises its discretion under section 7(2) of the Act and directs that a representation vote be taken in the following bargaining unit found by the Board, on an interim basis, to be appropriate:

All employees of the respondent working in and out of the General Motors of Canada Limited plants in St. Catharines, Ontario regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisors, chefs and office and clerical workers.

All employees of the respondent in the bargaining on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

25. Voters will be asked to indicate whether they wish to be represented by the applicant or the intervener in their employment relations with the respondent.

26. The matter is referred to the Registrar.

0486-79-R; 0491-79-R International Union of Operating Engineers, Local 793, Applicant, v. **The Tatham Company Limited**, Magnus Construction Limited, Respondents, v. Magnus Engineering and Construction Limited, Intervener.

Sale of a Business – Predecessor company winding down – Employees forming new company and purchasing assets from predecessor – Whether sale of business

BEFORE: R.O. MacDowell, Vice-Chairman and Board Members C.A. Ballentine and F.W. Murray

APPEARANCES: *S.B.D. Wahl and P. Gauthier for the applicant; George K. Murray for the respondents; S.C. Bernardo for the intervener.*

DECISION OF R. O. MACDOWELL, VICE CHAIRMAN AND BOARD MEMBER C. A. BALLENTINE; March 13, 1980

1. These are two applications under sections 55 and 1(4) of *The Labour Relations Act*. The applicant trade union contends that there has been a “transfer of a business” within the meaning of section 55 from The Tatham Company Limited to Magnus Engineering and Construction Limited (“Magnus”). Alternatively, it is argued that the two companies are engaged in related activities, under common control and direction, and that the Board should, pursuant to section 1(4), consider them one employer for the purposes of the Act.

I

2. J.G. and W.C. Tatham have been engaged in business in and around the City of Belleville for more than thirty years. The Tatham Company Limited is their creation, and until recently the company has had two distinct functions: it was used as a holding company for certain undeveloped land that the two brothers had purchased for investment purposes; and, it was the vehicle through which they carried on an active construction business. Originally the company was engaged in residential and commercial building, but by the 1970's the building facet of the business had been phased out and the company continued to carry on business as an excavating, gravel, sewer and water-main (and occasionally road building) contractor. It is this aspect of the Tatham company's business which is most relevant to the

present applications; and in view of the issues raised herein, it is interesting to note that the Tatham company became engaged in excavating and grading work after acquiring J.D. Van Alstine Construction – an excavating firm in the Trenton area. William Tatham testified that he and his brother had bought J.D. Van Alstine Construction (i.e., the corporate vehicle) in order to obtain that company's equipment – which Mr. Tatham described as a crucial requirement for this kind of business. Suitable equipment could have been leased, but by owning its own equipment and employing a competent mechanic, the company could minimize "down time" which resulted in idle employees and lost business. Tatham was unwilling to rely upon the repair services supplied by equipment leasing companies. It was more advantageous, from a business point of view, to invest in the necessary equipment.

3. Over the years, the Tatham company performed a variety of contracts involving underground services, sub-division and site servicing, excavating and grading. The bulk of the work was obtained by public tender, through advertisements in the local press and the Daily Commercial News. The value of the contracts usually varied from \$50,000.00 to half-a-million dollars, however, the company was not very competitive on the smaller jobs since there was active competition from non-union subcontractors. The work force varied with the level of construction activity, ranging from as low as six or seven employees to as high as forty employees when the company was busy.

4. Mr. Tatham testified that neither the company name nor the "goodwill" were very important. Business was obtained not by being well known, but by being the low bidder in the competitive tendering process. Personal contacts were occasionally helpful but, for the most part, work was allocated in accordance with the price bid. And obtaining the contract was only the beginning. As Mr. Tatham pointedly remarked: "Any fool can get a contract, and lose his shirt . . ." The company had to meet the price competition, but it also had to operate efficiently and keep its own costs below the contract price. Business success and profitability depended upon an efficient management team which, in recent years, consisted of: Douglas Davidson and William Tatham, who prepared the bids and estimates; Donald Smith, the Secretary Treasurer who kept the company's financial affairs in order; and Gordon Ferrill, who was The Tatham Company's site superintendent. Smith and Ferrill had been employees for over twenty years, as had Gordon Bain, the company's mechanic, whose responsibility was to keep the equipment operating.

5. Originally, the Tatham company was entirely owned and managed by the Brothers Tatham. The two brothers retained control through their ownership of virtually all of the outstanding stock. Over the years, however, as the brothers got older, and some of the company's key employees became more trusted and experienced, these employees began to assume a more prominent role in the management of the company. Donald I. Smith had joined the company after leaving high school in 1956 and eventually became Secretary Treasurer and a director. Douglas Davidson – a professional engineer, and William Tatham's son-in-law – joined the company in 1969 and eventually rose to the position of vice-president, after working for a time as field superintendent. He later became involved in estimating the project costs and preparing bids, and by 1977 he was sufficiently skilled, and trusted, that either he or William Tatham were signing the bids. Davidson also owns four-hundred shares of the company's stock.

6. J. G. Tatham retired in 1973. After his brother's retirement William Tatham retained ultimate authority in the company; but he was content to delegate this authority to

others as advancing years and illness made it more difficult for him to participate actively in the company's day-to-day activities. Mr. Smith testified that by 1977 Mr. Tatham was only coming in to work half days.

7. Smith, Davidson, Bain and Ferrill are the owners, officers, directors and management of Magnus, the alleged successor of the Tatham company. Smith is the new company's Secretary Treasurer. Ferrill is its Vice-President and Site Superintendent. Bain is a Vice-President and also the new company's Equipment Mechanic. Davidson is its President and Estimator. We are satisfied that the jobs performed by these four individuals, on behalf of Magnus, are identical to those which they performed when they were employees of the Tatham company. The only difference (and it is an important one, for their point of view) is that they are now working for their own company rather than someone else's.

8. In 1976-1977 the Tatham company suffered substantial financial losses. In the summer of 1977 its bonding company became concerned about the low level of the Tatham company's working capital and, in October of 1977, following receipt of the Tatham company's annual financial statement for fiscal 1977, the bonding company indicated that it would not post the required bonds to support the company's tenders unless there was a further infusion of working capital. As a result, the company was no longer able to bid on new projects. Attempts were made to secure bonding elsewhere, but these proved unsuccessful. The company completed ongoing projects and made some minor effort to bid on small, "non bonded" projects under fifty-thousand dollars in value; but this was not a viable alternative since, as has already been pointed out, the company was not competitive in this market. William Tatham concluded that he must either wind up the company and dispose of its assets or go bankrupt. He was unwilling, at his age, to deplete his savings and put further capital into the business.

9. By November, 1977 Tatham had decided that he no longer wished to carry on in the construction business, and he directed Smith and Davidson to paint the equipment and sell it for cash, so that he could "wind down" the business and pay off any outstanding accounts payable. It was anticipated that the equipment could be sold at auction (either piece-meal or in block) and sufficient cash could be realized to settle outstanding obligations. Bain's employment was terminated at the end of December. Ferrill was paid until the end of February, but had little to do after December. Davidson, likewise, was paid until the end of February. Smith was paid until the end of March, as he was actively engaged in settling the financial affairs of the company. Indeed, Smith remained a director and officer of the Tatham company until August 15th, 1979 (i.e., after the filing of the present application); however, his involvement with the ongoing affairs of the company was sporadic, and restricted to periodic updating of records, reconciling books and paying out monies owing as a result of past activities. The company had no new business activities or revenue after December, 1977.

10. Long before October, 1977 the four key employees of the Tatham company had discussed the possibility of setting up their own business. They felt that they were contributing considerably to the company's success, but were still on salary and did not share in the profits. They had even, on one occasion, put money into the company, receiving, in return, preference shares which gave them little control over the organization's economic destiny. The idea of striking out on their own was not a new one, but the idea became a necessity when, in the fall of 1977, it became clear that William Tatham did not wish to continue the

construction business. If the four key employees did not continue in business together they would forfeit the potential advantage of their combined skills and would remain “mere employees” of other enterprises.

11. The prime movers, behind what was to become Magnus Engineering and Construction Limited, were Davidson and Smith. They began to discuss the formation of a new business of sufficient size to be both viable and provide them with an adequate income. They had the accumulated expertise. What they needed was capital. Ferrill and Bain were drawn into the proposition later.

12. There followed a long, and largely disappointing, quest for money. The new venture would require bonding, financial backing for the purchase of equipment, and a sufficient line of credit. All of these were difficult to obtain. The decision of each financial institution seemed to be contingent upon suitable arrangements having *previously* been made with others. The Industrial Development Bank was unwilling to provide support unless two banks had already refused to assist the new venture. These refusals, at least, were not difficult to obtain. The bank with whom the Tatham Company dealt was non-committal. Other banks were equally wary. The bonding companies were unwilling to provide suitable bonds unless a significant sum was “locked in” to the company; but, if the money was “locked in”, it could not be used as a down payment on the equipment required to carry on business. This, in turn, meant that bank financing would assume a more important role in supplying funds for the acquisition of equipment and the initial start-up expenses of the new company. Eventually, after considerable negotiation with various banks and the bonding company, the four principals assembled the financial super-structure of the new company. This financial super-structure is based, essentially, on the private assets (mortgages, personal guarantees, etc.) of the four principals. In the search for adequate financing the Tatham Company provided no assistance to Magnus – directly or indirectly.

13. While Smith, Davidson, Bain and Ferrill were negotiating with various banks and the bonding company they were also trying to determine the assets which they would require to carry on a successful business. This determination, of course, was not unrelated to their financial negotiations since, without bank funds, they would be unable to purchase equipment at all (much of their capital being “locked in” in the new company at the insistence of the bonding company.) It was decided at an early stage that they could not afford to purchase the entire assets of the Tatham company. (There was no real thought given to buying assets elsewhere.) Accordingly, they drew up a list setting out those items which were essential to the new venture. The objective was to create a new organization which was both viable and would generate sufficient income to provide adequate compensation for the four key employees. By a selective purchase of the most important, and serviceable, equipment, the four principals hoped to acquire sufficient machinery to carry on business, and enough flexibility to perform more than one job at a time. After some negotiations with Tatham, the four principals agreed to purchase about two-thirds of the total equipment previously owned by the Tatham company. Because Dennis Bain, the equipment mechanic, was well acquainted with this particular machinery, it can be reasonably inferred that the equipment which the new company acquired was “the best of the lot.”

14. The new venture acquired a substantial portion of the Tatham company’s operating equipment. In addition it acquired *all* of the Tatham company’s office equipment, *all* of the Tatham company’s engineering equipment and *all* of the Tatham company’s repair shop

equipment. We are satisfied that with the sale of this equipment the Tatham company had eliminated itself as a potential competitor for the new venture. Even if the brothers Tatham had wanted to revive their business, they would have had to assemble an entirely new configuration of assets and technical expertise in order to do so. If the Tatham company were to “rise” again, it would be as a significantly different business organization. While some of the equipment not purchased by the new company was sold to third parties, much of it remains, rusting, in the field adjacent to Magnus’s business premises – which are still owned by the Tatham company, and are now rented to Magnus. The evidence indicates that the principals of Magnus made no real attempt to secure equipment elsewhere, nor was there more than a cursory search for an alternative location. As a result, save for the change in name, the tangible assets and physical layout of the new company are virtually identical to that of the Tatham company. Magnus has maintained the same construction machinery, the same office location and equipment, the same “yard”, the same shop facilities, the same managerial and operating structures and the same telephone number. Many of the employees who worked for the Tatham company now work for Magnus. Apart from the four “key” employees already mentioned, the two longest term equipment operators in the Tatham organization are employed as equipment operators by Magnus. The employee who did the wage administration and bookkeeping for the Tatham company is now employed by Magnus. As has already been pointed out, the four officers of Magnus perform precisely the same functions for Magnus which they previously performed for the Tatham company. Save for the absence of William Tatham and the company name, the assets, corporate organization, personnel and character of the business are identical to that of the Tatham company.

1. Mr. Smith testified that no effort was made *ab initio* to recruit the employees of the Tatham company, but that a number of such employees had left their names at the Magnus offices (which were the same as the Tatham offices) or had made telephone enquiries. Likewise a number of such employees had been hired “on site.” The site supervisor for Magnus was, of course, Carl Ferrill, who was previously the site supervisor for the Tatham company. It is not surprising that he would give preference to employees with whom he was familiar, and who had also worked previously for the Tatham company. From the perspective of the employees, or an outside observer, the business appeared to be substantially the same as it had always been – except now it had new owners and a new name.

16. While nothing really turns on this matter, it might be noted that the name “Magnus” originated with the Tatham company. The Tatham company had, some years ago, incorporated a company named Magnus Construction which had never become active. The four principals, with the permission of the Tatham company, (and without financial payment) incorporated the Magnus name in the style of their new venture. They also developed a new logo and colour scheme. Since there was little or no goodwill attaching to the Tatham name there was no reason to maintain any connection, or identity with, their previous employer. There was no transfer of customer lists, no non-competition covenant and no referral of business from the Tatham company to Magnus. There has been no transfer of contracts, and William Tatham has played no role in the running of Magnus. Tatham viewed the transaction with Magnus as a convenient way of disposing of much of his company’s assets, which avoided the 20% auctioneer’s fee which might otherwise have been payable if the Tatham company had sold the assets through this medium. Nevertheless, it is clear that *all* of the tangible assets of Magnus were purchased from the Tatham company. These assets were essential to Magnus’ ability to carry on business and, by the same token, the transfer of these assets to Magnus effectively prevented the Tatham company from continuing in business.

The location, office, equipment and management are the same; as are many of the employees – especially the “core” employees who were largely regular employees of the Tatham company. There has been no real change in the character of the business, although it appears that Magnus is involved in somewhat smaller projects, and has acquired certain customers and some repeat business that the Tatham company was unable to acquire. By actively soliciting business (“beating with bushes”), becoming more active in the local community and construction associations, and approaching potential customers who were unwilling to deal with William Tatham the principals of Magnus have been able to promote their enterprise, and develop their business opportunities. In this regard, it may also have been an advantage that Magnus was operating as a “non-union” company, and accordingly could afford to bid on projects from which the Tatham company would have been excluded.

17. The union contends that in the circumstances there has been a transfer of the Tatham company’s “business” to Magnus. The union argues that Magnus has acquired “the business” by acquiring virtually all of the Tatham company’s business organization, including: its excavating and grading machinery, its key employees and their accumulated expertise, its office staff, its office equipment, its engineering equipment, its business location and equipment and its service facilities. The union submits that nothing really turns on the change of name or the incorporation of a new corporate vehicle. Neither are critical to this business. The union urges the following proposition upon the Board:

“A business has been transferred and section 55 applies where the successor acquires an established configuration of assets, a developed system of managerial expertise and a particular *modus operandi*, which generates work opportunities for employers and profit for the company.”

The union submits that all of the essential elements of the Tatham business were transferred to Magnus, directly or indirectly. Magnus is virtually identical to Tatham, save for the new owners and name – which, in the circumstances, is irrelevant. It was common ground among the witnesses that little or no goodwill attached to the company name. What else could Tatham sell? Such goodwill as there might be remained largely with the key employees. Magnus, on the other hand, contends that what it purchased was not Tatham’s “business” but merely some of its assets. It has established a new, similar business; it has not purchased “the business” of The Tatham Company Limited. The Tatham company, because of its financial difficulties, did not exist as a viable commercial entity. There was no intention to acquire it, and it was not, in fact, acquired. Magnus contends that there has not been a “sale” of a “business” within the meaning of section 55 of the Act.

II

18. Before addressing the particular issues raised in this case, it may be useful to briefly review the purpose of section 55 and the Board’s approach to its interpretation. The relevant parts of the section itself are as follows:

“55. – (1) In this section,

(a) ‘business’ includes includes a part of parts thereof;

- (b) 'sells' includes leases, transfers and any other manner of disposition, and 'sold' and 'sale' have corresponding meanings.
- (2) Where an employer who is bound by or is party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.
- (3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires."

19. When a business (or part thereof) is transferred, or disposed of, the union retains bargaining rights for the employees in a "like unit" to that which existed prior to the transfer, and the transferee must continue to apply the collective agreement to the unit until the Board otherwise declares. The purpose of the section was succinctly summarized by the Board in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 703:

"The purpose of section 47a [now section 55] becomes important in assessing the various fact situations that arise. Section 47a operates on a number of levels. The first level, of course, is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect 'paper transactions', and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47a to preserve the bargaining rights and has attempted to look beyond 'paper transactions' to achieve that purpose. See, e.g. *Kem's Masonry*, [1964] OLRB Rep. Dec. 382 and *Trenton Riverside Dairy*, September 1964 (1964) 2 C.L.S. 76-1005.

A further and important purpose of section 47a is to preserve the bargaining rights with respect to work which has accrued to the benefit of

the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union has been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business."

20. Section 55 prevents the destruction of bargaining rights or a dislocation of the collective bargaining *status quo*, by transforming the institutional rights of the union and the collectively bargained rights of the employees into a form of "vested interest" which becomes rooted in the business entity, and like a charge on property, "runs with the business." To accomplish this objective, the statute gives a very special meaning to the word "sale", envisages that bargaining rights can be continued in a severable "part" of a business, abrogates the notion of privity of contract, and eliminates the significance of the separate legal identity of the new employer.

21. In keeping with the broad language of the statute and its remedial thrust, the Board has been disposed to give section 55 a liberal, rather than a narrow, interpretation. Little reliance is placed upon the legal form which the business disposition happens to take as between the old employer and its successor. The important factor, as far as collective bargaining law is concerned, is the relationship between the successor, the employees and the undertaking. Of course, the nature of the commercial transaction by which the business may have been transferred cannot be ignored, but it is equally important to consider the intention of the Legislature in drafting section 55, whether the subject transaction creates the mischief to which the statute was directed, and whether the language of the statute can be reasonably said to apply.

22. A section 55 application really involves two related questions: has there been a "sale" within the extended statutory definition of that term; and does what has been "sold", "transferred" or "disposed of" constitute a "business" or "part of a business." There is seldom any problem with respect to the first question. The real difficulty, as in the present case, is to decide whether what has been "transferred" or "sold" constitutes all, or part, of the predecessor's "business"; or, whether, there has merely been a transfer of assets or other "incidental" elements of the business. This is not to say that a sale of assets *only* cannot constitute the sale of business. As Mr. Scace in his book *The Income Tax Law of Canada* (3rd ed. L.S.U.C. 1976) points out in the chapter entitled "Buying and Selling a Business":

"Although businesses may be consolidated in a number of different ways e.g. by an amalgamation or a winding up, there are only two methods by which a business can be bought or sold, namely, the purchase or sale, of assets or shares."

A commercial lawyer could hardly consider it a novel proposition if one suggested that a "sale of a business" could be accomplished by an asset transaction. We cannot accept the submission that since only assets were transferred, *ipso facto*, there cannot be a transfer of

part of the business. The issue before the Board is whether this particular asset transaction can be considered a “sale” of “part of a business” within the meaning of section 55 of *The Labour Relations Act*. This requires an appreciation of the labour relations context, as well as some consideration of what a business is, and how one might determine whether it is “the business” which has been transferred.

23. A business is a combination of physical assets and human initiative. It is an economic organization which, in a sense, is more than the sum of its parts. In *Raymond Coté*, [1968] OLRB Rep. Mar. 1211, the Board put it this way:

“The meaning to be attached to the word ‘business’ depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is ‘the totality of the undertaking.’ *The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking per se but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitutes a business.*”
[Emphasis added]

A business is a commercial vehicle which has been rationally constructed to produce certain goods or services for a defined market – profitably, in the case of private sector enterprises but, in any event, efficiently. It is one harmonious whole consisting of many interrelated parts. From a labour relations perspective, however, the employer-employee relationships take on a special significance. From this viewpoint, the importance of the business is that it generates work for employees. The entrepreneurial activities of the business require it to enter the labour market as an employer and, this in turn, may give rise to the collective bargaining relationships to which *The Labour Relations Act* is directed. Section 55 preserves the stability of those established collective bargaining relationships if the business, or a coherent part of it, are transferred to a new owner.

24. As might be expected in a labour relations statute, the Board pays particular attention to the character of the business and the characteristics of the employer-employee relationship. In determining whether there has been a “sale” within the meaning of section 55, the Board attaches a special significance to the nature of the work performed in, and by, the business, before and after the alleged transfer. If the nature of the work performed subsequent to the transaction is substantially similar to the work performed prior to the transaction, this would support an inference that there has been a transfer of a business within the meaning of section 55. This approach was considered by the British Columbia Supreme Court in *R. v. B.C. Labour Relations Board ex parte Lodum Holdings Ltd.*, (1969), 3 D.L.R. (3d) 41 – an application for *certiorari* in respect of the then existing successor rights section of the *British Columbia Labour Relations Act* (it has since been amended.) At page 52 Dryer, J., observed:

“On must keep in mind that the problem before the Labour Relations Board was one of labour relations and consequently, though as pointed out above the whole law must be considered, the weight to be assigned

various factors and the inferences to be drawn from certain evidentiary facts are not necessarily the same as would be the case if the problem were one of, say, taxation or control of assets. *The importance of the 'business' in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors such as whether the jobs are being performed at the same or substantially the same times and places, in respect of the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer.*" [Emphasis added]

Unless there is a continuation of the work and jobs it would make little sense to preserve the collective bargaining relationship or the collective agreement – particularly in a case like the present one, where the trade union itself is organized on the basis of certain established craft skills.

25. In determining whether there has been a sale of the predecessor's business, the Board has also found it useful to consider the extent to which the various elements of the predecessor's business can be traced into the hands of the alleged successor; that is, whether there has been an apparent continuation of the business – albeit with a change in the nominal owner. This was the approach taken by the Board in *Culverhouse Foods Ltd.*, [1976] OLRB Rep. Nov. 691 (application for judicial review dismissed 18 Jan. 1979) where the Board listed some of the factors which might be significant in deciding if there had been a transfer of the predecessor's business:

"In each case the decisive question is whether or not there is a continuation of the business ... the cases offer a countless variety of factors which might assist the Board in its analysis; among other possibilities the presence or absence of the sale or actual transfer of goodwill, a logo or trademark, customer lists, accounts receivable, existing contracts, inventory, covenants not to compete, covenants to maintain a good name until closing or any other obligations to assist the successor in being able to effectively carry on the business may fruitfully be considered by the Board in deciding whether there is a continuation of the business. Additionally, the Board has found it helpful to look at whether or not a number of the same employees have continued to work for the successor and whether or not they are performing the same skills. The existence of non-existence of a hiatus in production as well as the service or lack of service of the customers of the predecessor have also been given weight. No list of significant considerations, however, could ever be complete; the number of variables with potential relevance is endless. It is of utmost importance to emphasize, however, that none of these possible considerations enjoys an independent life of its own; none will necessarily decide the matter. Each carries significance only to the extent that it aids the Board in deciding whether the nature of the business after the transfer is the same as it was before ..."

This was also the approach adopted by Widjery, J. in *Kenmir v. Frizzel, et al*, [1968] 1 All

E.R. 414 – a case arising out of legislation similar to section 55. At page 418 the learned judge commented:

“In deciding whether a transaction amounted to the transfer of a business, regard must be had to its substance rather than its form, and consideration must be given to the whole of the circumstances, weighing the factors which point in one direction against those which point in another. *In the end, the vital consideration is whether the effect of the transaction was to put the transferee in possession of a going concern, the activities of which he would carry on without interruption.* Many factors may be relevant to this decision though few will be conclusive in themselves. Thus, if the new employer carries on business in the same manner as before, this will point to the existence of a transfer, but the converse is not necessarily true, because a transfer may be complete even though the transferee does not choose to avail himself of all the rights which he acquires thereunder. *Similarly, an express assignment of goodwill is strong evidence of a transfer of the business, but the absence of such an assignment is not conclusive if the transferee has effectively deprived himself of the power to compete. The absence of an assignment of premises, stock-in-trade or outstanding contracts will likewise not be conclusive, if the particular circumstances of the transferee nevertheless enable him to carry on substantially the same business as before.* [Emphasis added]

If most of the elements that made up the predecessor’s business organization can be found in the hands of the successor, and are used for the same business purposes, there is usually a strong inference that there has been a “sale of a business” to which section 55 applies.

26. All of the cases to which we have referred recognize that there are no easily administered mechanical tests which permit the Board to readily distinguish between a “mere sale of assets” and a sale of “part of a business.” As the Board commented in *Metropolitan Parking, Inc.*, [1979] OLRB Rep. Dec. 1194 at paragraph 34:

“This distinction is easily stated, but the problem is, and always has been, to draw the line between a transfer of a ‘business’ or ‘a part of a business’ and the transfer of ‘incidental’ assets or items. In case after case the line has been drawn, but no single litmus test has ever emerged. Essentially the decision is a factual one, and it is impossible to abstract from the cases any single factor which is always decisive, or any principle so clear and explicit that it provides an unequivocal guideline for the way in which the issue will be decided.”

The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision on the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the succes-

sorship issue arises. Factors which may be sufficient to support a “sale of business” finding in one sector of the economy may be insufficient in another. In some industries, particular configuration of assets – physical plant machinery and equipment – may be of paramount importance; while in others it may be patents, “know-how”, technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other businesses, these factors will be insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.

III

27. The evidence in the present case indicates that Magnus has acquired, in block, virtually all of its assets from the Tatham company, and that those assets comprise approximately two-thirds of the assets formerly used by the Tatham company in its grading business. We are satisfied that the transfer of those assets effectively deprived Tatham of its ability to compete. The configuration of assets, know-how, managerial and employee skills which formerly carried on excavating business as the Tatham company is now, in substance, carrying on business as Magnus, and supplying precisely the same service to the same general market. There was very little which Tatham had, which has not been transferred, directly or indirectly, to Magnus; and much of this residue remains idle and rusting on the premises adjacent to the Magnus business office. If one considers the factors to which the Board referred in *Raymond Coté, supra*, (i.e., physical assets, buildings, tools, equipment, management and operating personnel and their skills) it is clear that virtually all of them were transferred to Magnus, and, paraphrasing the observations of Dryer, J. in *Lodum Holdings Ltd., supra*, it is equally clear that substantially the same jobs are being performed in substantially the same place in respect of substantially the same services, for substantially the same market.

28. It is true that certain elements mentioned by the Board in *Culverhouse, supra*, and *Kenmir v. Frizzel, supra*, were not transferred, but these are either of little significance in the construction industry, or irrelevant on the facts of this case. There is no “inventory” or “stock-in-trade” of the kind that a manufacturing concern might have; and, on the evidence, goodwill, customer lists, the company name, and its logo were not very significant parts of the predecessor’s business. In any event, much of the goodwill that there may have been is personal to the individuals concerned or has been retained by virtue of a continuation of the same premises, phone number and operating management. Of course, the new owners had to arrange their own financing to purchase this part of the Tatham organization; and, having done so, undertook some new initiatives, and acquired some customers not previously served by the Tatham company. This is not insignificant, but section 55 is triggered by a change of ownership, and it would be a most unusual “sale of a business” transaction in which the new owner did not put his own imprint on the organization by undertaking new business initiatives or introducing at least some new directions in management. Likewise, the new owner will almost always have his own sources of funds to finance the purchase. More important, in the present case, is the fact that there has been no significant change in the character of the business from which it operated as The Tatham Company Limited.

Magnus is carrying on substantially the same business in substantially the same manner as before.

29. We have carefully considered the cases cited to us by counsel for the respondent and, in particular, *Woodway Structural Components*, [1971] OLRB Rep. Nov. 732, *Canada Cement Lafarge Ltd.*, [1975] OLRB Rep. Dec. 905 and *Dufferin Steel*, [1976] OLRB Rep. Mar. 81. However, in each of these cases there was a significant change in the character of the work, produce or market so that the Board could conclude that what had been transferred was not the predecessor's business. The successor had merely incorporated incidental elements of that business into his own economic organization. Even though each of the elements acquired could previously be found in the predecessor's business organization (and, in that sense, were "part" of the predecessor's business) the evidence viewed in its totality indicated that these were not transactions to which section 55 applied. Similarly, in *Ralph Ford Electrical*, [1974] OLRB Rep. June 388 several key employees of the alleged predecessor became dissatisfied and struck out on their own in competition with their former employer and the Board found that there was not a transfer of a business but, rather, the creation of a new "parallel" business which only incidentally made use of some of the tangible elements of the predecessor's business organization. In none of those cases was there the degree of identity with the predecessor which is to be found in the present case, and in all of them there were factors indicating that it was not the predecessor's business which had been sold. Often the alleged successor already existed as a going concern prior to the asset purchase, and the predecessor's "business" continued to function independently, notwithstanding the alleged sale.

30. We have not ignored the fact that the owners of Magnus may not have considered themselves to be purchasing Tatham's "business" when they bought the bulk of its assets and continued to carry on business from the same location, with the same management and many of the same employees. However, this again is not determinative of the effect of the transaction, and the application of section 55. Since the Tatham company had little or no goodwill the four principals acquired almost as much as Tatham could sell and, having done so, they were immediately able to carry on the business of a grading and excavating contractor. In fact, the evidence indicates that the sale transaction did not close until one month after the closing date originally planned, and during this period Magnus became engaged in its first project, using the Tatham company's equipment, with that company's permission.

31. Having regard to the totality of the evidence, we are satisfied that there has been a "sale" of a "part" of the "business" of the Tatham company to Magnus within the meaning of section 55 of the Act. In our view, to reach any other conclusion would be to give the term "business" a meaning, in this case, at variance with that established in the Board's jurisprudence, and would ignore the broad language and intention of section 55. It follows that Magnus must recognize the union's bargaining rights, and becomes bound by any outstanding collective agreements between the union and the Tatham company. We are also satisfied, on the basis of the evidence before us, that there has been no abandonment of those bargaining rights. As early as May, 1978, barely two months after Magnus was incorporated, the applicant advised the respondent Magnus that it considered Magnus to be bound by the predecessor's bargaining obligations. The applicant also engaged in picketing and other related activity consistent with its assertion that Magnus was the successor of the Tatham company. There remains only the question of what agreements, if any, are outstanding.

32. The evidence indicates that the Tatham company was a “union company” in all of its operations. Exhibit 5 is a province-wide “Multi-sector” agreement recognizing the union as the exclusive bargaining agent for employees working as operating engineers anywhere in Ontario. This agreement was entered into by the Tatham company in 1974 and we are satisfied that it established the basis for the union’s bargaining rights in all sectors in which the Tatham company operated. In 1976, by virtue of an agreement dated October 22, 1976 (Exhibit 7) the Tatham company agreed to be bound by the collective agreement between the Labour Bureau of the Ontario Road Builders Association and of the Ontario Sewer and Watermain Contractors Association and the T.E.L. Council of Trade Unions, save as expressly varied by the terms of Exhibit No. 7. A “No Board Report” was issued by the Minister of Labour in respect of the latter collective bargaining relationship on July 19, 1978. We note further that by virtue of *The Labour Relations Amendment Act, 1977*, S.O. 1977, c. 31, Magnus must, by operation of the statute, be bound in the industrial, commercial and institutional sectors of the construction industry by the province-wide collective agreement between the Operating Engineers and the relevant designated employer bargaining agency. We are satisfied, therefore, that the province-wide (ICI) agreement applies, insofar as Magnus has operated in the ICI sector and that, until at least August, 1978, Magnus was bound by the T.E.L. agreement insofar as it operated in other sectors to which that agreement applied (subject to the above mentioned “rider”). It is unnecessary, for the purposes of this decision, to consider the precise contractual relationships which “flow through” as a result of our section 55 determination. This issue was not a principal part of the parties’ cases – being more appropriately dealt with in Board File 0557-79-M, which was the companion application under section 112a, which the parties have held in abeyance pending our section 55 determination. The applicability of the various agreements and the liability, if any, arising therefrom, depends upon the nature of the company’s activities and the sectors in which it operated during the relevant period. It is not entirely clear how an agreement (like the T.E.L. agreement) based on section 43 of the Act is affected by a section 55 sale, nor is it clear how a purported “rider” fits within the scheme; and doctrines, such as laches, may be available under section 112a which are not available under section 55.

33. There remains the question of the union’s application under section 1(4) of the Act. In view of our disposition of the section 55 application, we do not consider it necessary to pursue the section 1(4) issue, or determine whether, in the circumstances, the Board can, or should, exercise its discretion to make a section 1(4) declaration. The union’s application in this respect is, therefore, dismissed.

DECISION OF BOARD MEMBER F.W. MURRAY

1. I dissent.

2. Based on the totality of the evidence I would not have found a “sale of a business” from the Tatham Company to Magnus within the meaning of Section 55 of *The Labour Relations Act*.

3. In my view the evidence disclosed that by December, 1977, the Tatham Company had ceased to operate as a functional business organization in the construction industry. What was transferred several months later, therefore, was not “the business” of the Tatham Company but, rather certain of its assets. These assets were incorporated into a new business which, while similar in nature to the business carried on in part by the Tatham Company,

and while indeed created by some of its former employees, was clearly a new company which established its own presence in the market and did not benefit from any connection with the Tatham Company. Moreover, the evidence suggests that the new company did not serve precisely the same market as the Tatham Company had served, but was in effect involved generally in somewhat similar projects.

4. I am also concerned with the lapse of time between the creation of the new business and the date of the making of this application. There was a substantial delay before the Union sought to exert its rights under Section 55, and this delay makes the task of the Board in assessing the evidence much more difficult.

5. Surely there is an onus on the party seeking to preserve its bargaining rights to move expeditiously under Section 55 when any question arises as to its status. This Board has consistently held that a delay operates as a bar to a related employer declaration under Section 1(4) of the Act, and in my view the principles enunciated by the Board in Section 1(4) cases are clearly applicable to cases such as the present one.

6. I would not have made a Section 55 declaration in the circumstances of this case, and, even if I were satisfied that a "sale" within the meaning of Section 55 had taken place, having regard to the substantial and unnecessary delay, I would have ordered a representation vote, pursuant to section 55(8) of the Act.

1977-79-R Local 323T, Bakery, Confectionery & Tobacco Workers International Union, Applicant, v. VS Services Ltd., Respondent.

Bargaining Unit – Certification – Practice and Procedure – Determining whether students and part-timers excluded from unit – Relevant procedure considered

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. D. Bell and O. Hodges.

APPEARANCES: *Morris Zimmerman, Charles Ernest Hill, Robert Conway and Sean Kelly for the applicant; M. Kane for the respondent.*

DECISION OF M. G. MITCHNICK, VICE-CHAIRMAN, AND BOARD MEMBER J. D. BELL; March 12, 1980

1. This is an application for certification.

2. At the outset, the applicant was required to prove its status as a trade union within the meaning of *The Labour Relations Act*.

3. The evidence establishes that the Bakery, Confectionery & Tobacco Workers International Union arose out of the merger in August 1978 of the Tobacco Workers International Union of America and the Bakery and Confectionery Workers International Union

of America. Prior to the merger, bargaining rights for the Imperial Tobacco Company's employees in its plant at Guelph, Ontario were held by Local 323 of the Tobacco Workers International Union of America. Following the merger, a new charter was issued by the parent body in the name of Local 323T, Bakery, Confectionery & Tobacco Workers International Union, the present applicant. The "new" Local has already been recognized by Imperial Tobacco for its own production employees.

4. Having regard to all of the evidence, the Board is satisfied that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

5. Having regard to the agreement of the parties, the Board further finds that all employees of VS Services Ltd. at the Imperial Tobacco plant, Woodlawn Road, Guelph, save and except unit manager, supervisors and persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, constitute a unit of employees appropriate for collective bargaining purposes.

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7. A certificate will issue to the applicant.

DECISION OF BOARD MEMBER O. HODGES:

1. I dissent.

2. The applicant had applied for a bargaining unit which excluded "persons employed less than 24 hours a week". The unit proposed by the respondent in its reply excluded "persons regularly employed for not more than 24 hours per week and students". At the hearing the applicant agreed to also exclude students as sought by the respondent. The respondent advised the Board that neither part-time employees nor students were employed on the date of application or at the time of the hearing, and that there was no history of employing either category.

3. Under section 6(1) of the Act, the Board is required to determine the unit of employees that is appropriate for collective bargaining upon an application for certification. Where the parties have reached agreement on the description of the bargaining unit, the Board will take into consideration any such agreement of the parties in determining the appropriate bargaining unit, though not if it contravenes a Board policy. The Board is never bound by an agreement between the parties. (See *Tamco Limited*, [1974] OLRB Rep. Nov. 764.)

4. The question of the Board's general policy regarding part-time employees and students has been raised in several recent cases. This is an appropriate occasion to outline my position on this matter.

5. It is my opinion that when the schedules filed by an employer *do not* contain the names of persons designated as "regularly employed for not more than 24 hours per week" and where *neither party requests* the exclusion of a part-time category, the Board should not question the parties as to whether a part-time category is to be excluded.

6. Where the schedules filed by an employer *do* contain the names of persons designated as “regularly employed for not more than 24 hours per week”, the Board should, at the time the bargaining unit is being discussed, ask the parties whether they wish to exclude such persons. The number of persons in the part-time category should not be revealed at this stage, even in response to a specific inquiry.

7. Where either party asks for exclusion of the part-time category and the schedules filed by the employer *do not* contain the names of persons designated as “regularly employed for not more than 24 hours week”, the Board should ask whether the employer has had such persons employed at any time. When there has been a history of employing persons in the part-time category, the Board should ascertain:

- (a) How many such persons have been employed;
- (b) How recently such persons were employed;
- (c) Whether such persons may be employed again and if so, when is that likely to be.

8. When the schedules are filed after the date of the hearing and they contain the names of persons designated as “regularly employed for not more than 24 hours per week”, but the respondent *has not* appeared at the hearing, and:

- (a) No reply has been filed by the respondent prior to the hearing, or
- (b) A reply has been filed which makes no reference to the exclusion of the part-time category, and
- (c) The *applicant has not requested* the part-time exclusion, the applicant is to be informed that the names of such persons *do appear* on the schedules, *if* the applicant’s entitlement to certification or to a vote may be affected by the inclusion of such persons in the bargaining unit. In these circumstances the applicant will be requested to make representations as to whether it does or does not want the inclusion of such persons in the bargaining unit.

9. In the situation set out in Para. 8, the respondent having failed to file the requisite schedules before the hearing, will not normally be afforded an opportunity to make representations as to whether or not such persons are to be included in the bargaining unit.

10. No question should be asked concerning the wishes of the parties as to the exclusion of students employed during school vacation periods, unless such an exclusion is specifically requested by one of the parties.

11. Where one of the parties asks for the exclusion of students employed during the school vacation periods, the Board should ascertain the employment history of students along the lines indicated in Para. 7.

12. Where only one name appears on Schedule “B” as being “regularly employed for not more than 24 hours per week”, and the applicant trade union requests the inclusion of

part-time employees in the bargaining unit, and the part-time employee is a member of the union, the bargaining unit should be described in the endorsement so as to include the part-time employee.

13. In circumstances where employees have been engaged for only a short time, as at a new manufacturing facility, and the stage of development or the period of the year when part-time employees or students are likely to be employed has not been reached, the Board should not find these circumstances a sufficient consideration to warrant a departure from the *general principle* that such classifications are to be included in a bargaining unit where the *employer has not had persons in such classifications in his employ prior to or at the time of the application*. It appears that this general principle has been followed for many years and until very recently, as for example, in the instant case.

14. It is my view that the above-described rationale and procedure previously followed by the Board was effective and fair. It is my opinion that the current practice in the matter of the exclusion of part-time and student categories merits reconsideration. For those reasons and following my reasons in *Jutras Die Casting Limited*, Board File No. 1974-79-R, I would reject the agreement of the parties to exclude part-time employees and students, and I would not exclude those categories from the bargaining unit.

15. In the particular circumstances of this case, where the applicant trade union is the incumbent bargaining agent for the production employees of the Company (Imperial Tobacco Company), which has awarded a contract for the catering services of the respondent herein (VS Services Ltd.), I accept the agreement of the parties to restrict the certification to the premises of the host company who have contracted for the services of the respondent employer.

1394-79-U James H. Hopson, Complainant, v. International Union of Operating Engineers, Local 796 & York University Respondents.

Duty of Fair Representation – Union settling grievance over objections of grievors – No violation of section 60

BEFORE: R. O. MacDowell, Vice-Chairman.

APPEARANCES: *W. A. Harrison, J. Hopson and S. Gibson for the complainant; Maurice A. Green and Jack Sullivan for the respondent; D. J. Mitchell, C. Miller and R. Kori for York University.*

DECISION OF THE BOARD; March 17, 1980

1. This is an application under section 79 of *The Labour Relations Act* alleging a breach by the respondent trade union of section 60 of the Act. Section 60 provides as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

The grievors, James Hopson, Stewart Gibson and Harry Gee, contend that the trade union breached its section 60 obligation when it settled their grievance rather than taking the matter to arbitration. At the time of the events giving rise to this grievance the grievors were employed as operating engineers at York University. York University has received notice of this proceedings, and appeared at the hearing. Having regard to Rule 54 of the Rules of Practice, the Board directs that York University be added as a party respondent in this matter and that the style of cause be amended accordingly.

2. For some years York University has scheduled an annual plant shutdown for the purpose of cleaning and repairing the steam distribution system. This shutdown normally occurs on weekend “off hours” in order to minimize the disruption to the University. During the shutdown, the operating engineers are scheduled to work overtime. The University also employs the services of outside subcontractors. In 1979, arrangements were made for the annual shutdown to take place from 7:00 p.m. Friday, May 4th, until 4:00 a.m. Saturday, May 5th. The grievors were scheduled to work on an overtime basis for at least part of that period, and when they refused to so do they were each given a three-day suspension.

3. Steward Gibson and James Hopson testified that their employer had posted a memo advising them of the scheduled overtime, and that none of the employees was in any doubt that overtime was being required, and was regarded by their employer as compulsory. The previous year a refusal to work overtime had resulted in formal discipline being imposed on the individuals involved. The grievors were aware, therefore, that if they refused to work, and advanced no reason for this refusal, they might be subject to discipline. Nevertheless, after discussing the issue among themselves, the three employees decided not to work. They questioned the University’s right to schedule overtime on a compulsory basis and they objected to working the Friday evening/Saturday morning hours, on jobs which in their view (but not their employer’s) could have been accomplished during normal working hours. In addition, it would appear that Harry Gee, (who was at that time a shop steward for the respondent union) was dissatisfied with the progress of negotiations for a new collective agreement and was unhappy that he had not been allowed free parking on campus. When their supervisor requested the reason for their refusal to work, the three employees wrote the following memo:

“It is not necessary for us to supply reasons, as this is not, repeat not, an emergency shutdown but a planned shutdown that could be scheduled at normal hours, therefore it is purely voluntary. We have chosen not to volunteer.”

4. On or about May 9, 1979, by registered letter over the signature of R. Kori, superintendent of utilities, each of the grievors was advised that he was being suspended for three working days, without pay, for his failure to report for work. On May 16, 1979, each of the grievors filed a grievance alleging that his suspension was improper and claiming payment

for all time lost and a public apology. It was also contended that the suspension letter was “full of innuendo, hearsay and misquotes” and that the suspension was a form of harassment related to the ongoing contract negotiations. Before the Board, however, both Mr. Hopson and Mr. Gibson confirmed that the statements contained in the suspension letter were substantially correct. There was no real dispute about the facts. The only issue raised by the grievance was the propriety of compulsory overtime.

5. Article 2 of the collective agreement reserves to management, *inter alia*, the sole and exclusive right to schedule operations; moreover, a “scheduled shutdown of the plant”, scheduled overtime, and scheduled weekend working hours are all contemplated by the language of the agreement and attract overtime pay at time and one half the regular rate. However, there is no clause in the collective agreement specifically and explicitly authorizing the employer to schedule overtime on a compulsory basis, nor is there any clause specifically making overtime voluntary.

6. As has already been pointed out, the overtime issue is not a new one for these parties. It has been the subject of past grievances, and has been raised by the trade union at the bargaining table on several occasions. Part of the problem, as perceived by the union, was that the engineers were required to work side by side with the employees of outside subcontractors who were being paid at a higher rate. This was a source of friction and dissatisfaction, among the operating engineers employed by the University. To meet this concern the trade union had attempted to negotiate premium pay of “double time” for hours worked during the plant shutdown, but the employer refused to make this concession. The employer took the position that the right to schedule overtime was a management right, under the agreement, and it was not prepared to modify the method of payment.

7. Following the filing of the grievance, the matter was processed through the various stages of the grievance procedure, an arbitration board was constituted, and a date scheduled for the hearing. Throughout this procedure, Harry Gee was the primary link between the grievors and Jack Sullivan – a business agent of the parent international union who becomes involved in the grievance procedure at the third step. This is in accordance with the usual practice of the union. Once the matter proceeds beyond the initial steps of the grievance procedure, it is the local steward and the international representative who have carriage of the proceeding. The grievors themselves are not directly involved.

8. Following the failure to resolve the grievance in the grievance procedure, the union retained a firm of solicitors to render an opinion on the merits of the grievance, and the chances of success. A meeting was arranged between the grievors and these solicitors so that counsel could be fully briefed with respect to the facts. The union’s solicitors advised that, in their view, the case was “iffy”, with a perhaps “fifty fifty” chance of success. The issue of compulsory overtime is not free from doubt, especially where, as here, the employer has an overtime permit issued by the Employment Standards Branch of the Ministry of Labour. (See generally, Brown and Beatty, *Canadian Labour Arbitration* Canada Law Book 1977 at pp. 214-217, 355-360, and authorities cited therein). The parties’ past practice and other extrinsic evidence all supported the employer’s interpretation of the agreement. In the circumstances the solicitors were reluctant to give an optimistic appraisal of the chances of success.

9. On October 10, 1979 shortly before the day fixed for the hearing, Sullivan ar-

ranged a meeting with representatives of the employer in order to make a final effort to reach a settlement. At this meeting the union was represented by Sullivan, and Ian Gibson – the new shop steward who had replaced Harry Gee. Harry Gee and Stewart Gibson had terminated their employment on or about July 9, 1979. Sullivan hoped that the impending hearing would induce the employer to moderate its position, but initially this was not the case. The employer pressed the union to abandon the grievances of the two individuals who were no longer employed by the University as a condition precedent to resolving the Hopson grievance. After further discussion of the merits of the case, the employer finally agreed to treat all of the grievors in approximately the same way as the employees in the earlier overtime incident had been treated. The employer undertook to withdraw the suspensions and substitute a written warning. Each of the employees was to be paid for three “eight hour days” – an ordinary work day as specified by Article 21 of the collective agreement. Finally, in order to minimize the likelihood of this problem arising again vis-a-vis Mr. Hopson or the other operating engineers, the employer agreed to pay double time for overtime hours worked during the annual plant shutdown.

10. The proposed settlement would not fully vindicate the grievors’ position. Since the grievors had been working twelve-hour shifts, their three-day suspension had resulted in a loss of thirty-six hours pay. However, these shifts had been arranged by “private agreement” between the employer and the employees, and were not expressly contemplated or authorized by the collective agreement. The union was concerned that even if it won the arbitration, an arbitrator might not have the jurisdiction to order compensation calculated with reference to a “private arrangement” which was not itself authorized by the collective agreement. The union was also concerned that its settlement of the earlier grievances (in which the issues were identical) would prejudice its position. On the other hand, the proposed settlement was consistent with the resolution of these previous grievances and if accepted would provide for the payment of double time for hours worked during the shutdown – a concession which the union had not been able to achieve at the bargaining table and which no arbitrator could have awarded. This feature of the settlement went to the root of what the union perceived to be the basic problem. The union believed that it met the general concerns of both the grievors and the other employees in the bargaining unit, and might well avoid a recurrence of the problem. This, of course, was also the perception of the University and it was for this reason that this aspect of the settlement was acceptable to it.

11. Sullivan and Gibson decided that in the circumstances, the proposed settlement was as good or better than anything they could hope to achieve at arbitration and that the acceptance of the settlement would avoid the possibility of an outright loss – a possibility of which the union had been warned by its solicitors. On October 10, 1979 Sullivan and Gibson, on behalf of the union, executed a formal settlement of the three grievances in the terms outlined above. It might be noted, parenthetically, that this settlement did not entirely avoid the cost of arbitration, for the union still had to bear the financial cost of its solicitors’ opinion as well as a cancellation fee charged the board of arbitration for the late cancellation of the hearing. There is no suggestion that the union settled the case simply to avoid the cost of arbitration.

12. The grievors were dissatisfied with the settlement; although Mr. Gibson candidly admitted that, in his view, Sullivan had made his best efforts on their behalf. Hopson and Gibson testified that they regarded the grievance as a matter of principle. They were quite prepared to lose. As Mr. Hopson put it, he wanted the issue of compulsory overtime deter-

mined by an arbitrator “win, lose or draw”. The grievors had made their position clear to the union and no solution short of full vindication or arbitration would have been acceptable to them. It is clear that if the trade union had departed from its usual practice and had involved the employees in the final settlement discussions, they would merely have reiterated a position of which both the employer and trade union were aware, and which the union considered in reaching its final decision to settle the case. The Board also accepts the evidence of Jack Sullivan that the responsibilities of servicing some ninety small units of employees scattered across Ontario create a busy schedule which makes it difficult for him to be involved personally in direct communications with the grievors in every situation. It is for this reason that the union relies upon the local shop steward as the conduit to the grievors. Such reliance is reasonable in the circumstances and in any event the evidence indicates Sullivan was personally involved in investigating and assessing the situation.

13. Counsel for the grievors contended that the union’s conduct in accepting the proposed settlement was motivated by bad faith or ill will towards the grievors. There is no evidence whatsoever to support this contention nor did either of the grievors suggest that this was the case. Following Mr. Gibson’s termination of employment Sullivan assisted him with difficulties which he was experiencing with the Unemployment Insurance Commission and represented him before the board of referees. The union also found Mr. Gibson employment at St. Lawrence Starch Company. Similarly, Harry Gee was assisted to obtain employment at Maple Leaf Mills Limited. There is simply no support for the allegation that the decision to settle the grievors’ case was discriminatory or taken in bad faith. It remains to be determined, whether the decision was “arbitrary”.

14. In *Douglas Aircraft of Canada Limited*, [1979] OLRB Rep. Aug. 745, the Board discussed the impact of section 60 on the processing of employee grievances in the following way:

“7. Section 60 requires a trade union to act fairly, *inter alia*, in the handling of employee grievances; but it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance is honest consideration but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, but in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official – especially an elected one – cannot be expected to exhibit the skills, ability, training and judgment of a lawyer. Union officials are entitled to make honest mistakes.

8. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which the parties seek to amicably resolve their differences. As in the ordinary civil litigation proceeds, it may be in the interest of both

parties to seek an 'out of court' settlement which is more modest than either might have obtained had it been entirely successful before the adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation. The generosity of the settlement will depend upon the skills of the negotiating parties, the merits of the claim the cost of the litigation process and the degree of 'downside risk', i.e., the long-term ramifications of an adverse judgment."

Similar sentiments were expressed by the Supreme Court of the United States in *Vaca v. Sipes* (1967), 386 U.S. 1971 – a case involving the American duty of fair representation upon which the Ontario legislation is modelled:

"Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. In LMRA Section 203(d), 29 USC Section 173(d), Congress declared that 'Final adjustment by a method agreed upon by the parties is...the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.' In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavour in good faith to settle grievances short of arbitration. Through this settlement process, frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures. Moreover, both sides are assured that similar complaints will be treated consistently, and major problem areas in the interpretation of the collective bargaining contract can be isolated and perhaps resolved. And finally, the settlement process furthers the interest of the union as a statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement. See Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601 (1956).

If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievance to the vagaries of independent and unsystematic negotiation. Moreover, under such a rule, a significantly greater number of grievances would proceed to arbitration. This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully...It can well be doubted whether the parties to collective bargaining agreements would long continue to provide for detailed grievance and arbitration procedures of the kind encouraged by LMRA Section 203(d), *supra*, if their power to settle the majority of grievances short of the costlier and more time-consuming steps was limited by a rule permitting the grievance

unilaterally to invoke arbitration. Nor do we see substantial danger to the interest of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration. For these reasons, we conclude that a union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration.”

The whole objective of the pre-arbitration discussion is to arrive at an amicable resolution of the matters in dispute which fairly accomodates the interests of all of the parties involved. The very purpose of the procedure is to facilitate compromise. It cannot be said that the existence of a compromise, *ipso facto*, demonstrates arbitrary conduct upon which a breach of section 60 of *The Labour Relations Act* can be based. While section 60 requires the union to give honest consideration to the interests of the individual grievors, I do not think that section 60 elevates those interests to such paramount importance that they outweigh all other considerations. No doubt individual employees must be dissatisfied if their position is not fully vindicated, just as they may be dissatisfied if the negotiated collective agreement does not fully meet their own particular concerns. Neither situation, in itself, demonstrates that the trade union’s conduct has been arbitrary.

15. Can the union’s conduct be characterized as arbitrary in the circumstances of this case? Having regard to the totality of the evidence I am satisfied that it cannot. The union did not refuse to procees the employees’ claims. The grievance was carried through the various stages of the grievance procedure. The merits of the employee’s position were carefully considered and an arbitration board was constituted. The union retained solicitors, sought a legal opinion, and made arrangements whereby the employees could brief counsel. The union refused to “trade off” the interests of those employees who were no longer members of the bargaining unit, and continued to press the employer for a solution which would not only resolve the immediate problem but also meet the concerns which the grievors shared with other members of the bargaining unit. The resulting settlement is an eminently reasonable one which contains an important feature which could not have been attained if the union had proceeded to arbitration, and had been entirely successful. I am satisfied that the union carefully weighed the views of the employees, the weaknesses of its own case, and the chances of success at arbitration, against the tangible benefits which could be obtained by accepting the employer’s proposed settlement. On the basis of this assessment the union decided that the settlement was preferable, and I can find nothing improper in the course of conduct which it adopted. In the result, this application must be dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR BOARD DURING FEBRUARY 1980

BARGAINING AGENTS CERTIFIED DURING FEBRUARY

No Vote Conducted

0006-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Esam Construction Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, save and except non-working foreman and persons above the rank of nonworking foreman." (7 employees in the unit).

0140-79-R: Ontario Public Service Employees Union (Applicant) v. Family Services of Hamilton-Wentworth Inc. (Respondent).

Unit #1: "all employees of the respondent at Hamilton, Ontario, save and except director, persons above the rank of director, secretary to the executive director, office supervisor, home economist – youth residence, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (36 employees in the unit).

Unit #2: "all employees of the respondent at Hamilton, Ontario, who are regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except director, persons above the rank of director, secretary to the executive director, office supervisor and home economist – youth residence." (26 employees in the unit). (*Clarity note*).

0572-79-R: Local Union 636 of the International Brotherhood of Electrical Workers, (AFL-CIO-CLC) (Applicant) v. The Wasage Beach Hydro-Electric Commission (Respondent).

Unit: "all outside employees of the respondent save and except superintendent, persons above the rank of superintendent and office staff." (8 employees in the unit). (*Having regard to the foregoing*).

0975-79-R: Ontario Public Service Employees Union (Applicant) v. Hawkesbury and District General Hospital (Respondent) v. The Canadian Union of Public Employees (Intervener).

Unit: "all paramedical personnel of Hawkesbury and District General Hospital, in Hawkesbury, Ontario, save and except Director of Personnel, those above the rank of Director of Personnel and persons covered by subsisting collective agreements." (7 employees in the unit).

1237-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. Belvedere Drain and Concrete Limited (Respondent).

Unit: "all cement masons and cement masons' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and

plasterers, non-working foremen and persons above the rank of non-working foreman.” (23 employees in the unit). (*Having regard to this agreement*).

1271-79-R: Ontario Nurses’ Association (Applicant) v. Mattawa General Hospital Sisters of Charity of Ottawa (Respondent).

Unit #1: “all lay registered and graduate nurses employed in a nursing capacity by the respondent at Mattawa, save and except Head Nurses, persons above the rank of Head Nurse, and persons regularly employed for not more than twenty-four hours per week.” (10 employees in the unit).

Unit #2: “all lay registered and graduate nurses regularly employed for not more than twenty-four hours per week in a nursing capacity by the respondent at Mattawa, save and except Head Nurses and persons above the rank of Head Nurse.” (3 employees in the unit).

1373-79-R: Shopmen’s Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Applicant) v. Anatamex Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the Respondent employed in the Town of Vaughan in the Regional Municipality of York, save and except foremen, persons above the rank of foreman, persons engaged in field erection work, office and clerical employees, draftsmen, watchmen, guards, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week.” (47 employees in the unit). (*Having regard to the agreement of the parties*).

1392-79-R: Ontario Nurses’ Association (Applicant) v. Lincoln Place Nursing Home (Respondent).

Unit: “all registered and graduate nurses employed in a nursing capacity by the respondent in Metropolitan Toronto, save and except nursing supervisors and persons above the rank of nursing supervisor.” (17 employees in the unit).

1440-79-R: Alliance Des Enseignants de la Toronto French School (Applicant) v. The Toronto French School (Respondent).

Unit #1: “all teaching staff of the respondent at Metropolitan Toronto and Mississauga, save and except Headmaster and Principal, Branch Supervisors, Librarian, Lab Technicians, persons solely engaged in a clerical, administrative or support capacity and teachers regularly employed for not more than 24 hours per week.” (89 employees in the unit). (*Having regard to the agreement of the parties*). (*Bargaining Unit #2 – Application Certified Subsequent to Post-Hearing Vote*).

1468-79-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Brentview Construction Limited (Respondent).

Unit: “all construction labourers employed on residential construction, and all cement masons and cement masons’ apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Ontario, save and except construction labourers employed as helpers of bricklayers and plasterers, non-working foremen and persons above the rank of non-working foreman.” (35 employees in the unit). (*Having regard to this agreement*).

1501-79-R: International Association of Bridge, Structural and Ornamental Ironworkers, Local 834 (Applicant) v. York Steel Construction Limited (Respondent).

Unit: “all employees of the respondent working at its plant at 75 Ingram Drive, Toronto, save and ex-

cept foreman, persons above the rank of foreman, office employees, and persons covered by a subsisting collective agreement between the respondent and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (Field Erection)." (176 employees in the unit).

1597-79-R: The Canadian Union of Public Employees (Applicant) v. Elsie Able Enterprises Limited, carrying on business under the name "Casselman Nursing Home" (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at its Nursing Home in Casselman, Ontario, save and except Administrator, Registered Nurses, Director of Nursing, Registered Nursing Assistants, Private Secretary to the Administrator, Nurses Aides' Co-ordinator, Head Chef, Maintenance Supervisor, Housekeeping Supervisor, Laundry Supervisor, Occupational Therapy Director, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (80 employees in the unit). (*Having regard to the agreement of the parties*).

1630-79-R: Canadian Union of Distillery, Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304 (Applicant) v. The Clorox Company of Canada Ltd. (Respondent).

Unit: "all employees of the respondent at Bramalea, Ontario, save and except supervisors, foremen, persons above the rank of supervisor or foreman, sales and office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (41 employees in the unit). (*Having regard to the agreement of the parties*).

1666-79-R: Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of Brant (Respondent) v. Employee (Objector).

Unit #1: "all employees of The Children's Aid Society of Brant, in the City of Brantford, save and except the Director, Assistant Director, Supervisors, persons above the rank of supervisor, secretary to the executive director, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons employed at its Branch Office in Ohswegen." (55 employees in the unit). (*Having regard to the agreement of the parties*). (*Bargaining Unit #2 – See Application Certified Subsequent to Post-Hearing Vote*).

1676-79-R: Union of Bank Employees (Ontario), Local 2104, Canadian Labour Congress (Applicant) v. Brant Community Credit Union Limited (Respondent).

Unit: "all employees of the respondent at Brantford, Ontario save and except Supervisors, persons above the rank of Supervisor and Secretary to the General Manager." (17 employees in the unit). (*With the agreement of the parties*). (*Clarity note*).

1823-79-R: Christian Labour Association of Canada (Applicant) v. Versa-Care Retirement Lodge, Owned and Operated by Versa-Care Limited (Respondent) v. Ontario Nurses' Association (Intervener).

Unit #1: "all employees of the respondent at Owen Sound save and except Administrator, registered and graduate nurses employed in a nursing capacity, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Owen Sound regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except Administrator and registered and graduate nurses employed in a nursing capacity." (8 employees in the unit). (*Having regard to the agreement of the parties*).

1826-79-R: Pharmacists and Professional Employees Association Local 1976, chartered by the Retail Clerks International Union, C.L.C. – C.F.L.-C.I.O. (Applicant) v. Marsdale Manor Nursing Home Ltd. (Respondent).

Unit #1: “all employees of the respondent in Cambridge, Ontario, save and except professional medical staff, registered and graduate nurses, office staff, Director of Nursing and persons above the rank of Director of Nursing, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (16 employees in the unit).

Unit #2: “all employees of the respondent in Cambridge, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except professional medical staff, registered and graduate nurses, office staff, Director of Nursing and persons above the rank of Director of Nursing.” (15 employees in the unit).

1865-79-R: London and District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. The Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Joseph’s Hospital, London, Ontario (Respondent).

Unit: “all lay employees of the Sisters of St. Joseph of the Diocese of London in Ontario, as owner and operator of St. Joseph’s Hospital, London, Ontario at London, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, social workers, social work assistants, persons engaged in research work, technical personnel (including in this exception, graduate and undergraduate: audiologists, Physio-, Occupational, Psychiatric and Speech therapists, psychologists, psychometrists, computer programmers, biomedical repair technicians, certified and non-certified dental assistants, photography technicians and artists-medical illustrators, registered, non-registered and student: laboratory technicians, X-ray technicians, respiratory technicians, Electrocardiogram technicians, Electroencephalogram technicians, pulmonary technicians, nuclear medicine technicians, ophthalmic technicians and laboratory assistants) supervisors, persons above the rank of supervisor, foremen, persons above the rank of foreman, chief engineer, office and clerical staff (including in this exception: ward clerks, admitting clerks, receptionists, safety and security officers, information clerks, mail clerks, cashiers, librarians and switchboard operators), security guards, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (408 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity note*).

1889-79-R: United Steelworkers of America (Applicant) v. Bradcon Equipment Limited (Respondent).

Unit: “all employees of the respondent in Mississauga, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (15 employees in the unit). (*Having regard to the agreement of the parties*).

1891-79-R: Canadian Union of General Freight Handlers (Ind.) (Applicant) v. Shuntmaster Ltd. (Respondent).

Unit: “all employees of the respondent at its location in Metropolitan Toronto engaged in loading and unloading freight, shunting or placing of loads of freight, save and except managerial and security personnel, office and clerical staff, persons employed for not more than 24 hours per week and students employed during the school vacation period.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

1892-79-R: United Food & Commercial Workers International Union (Applicant) v. Tilden-Rent-A-Car Company (Respondent).

Unit #1: “all garage employees of the Respondent in Metropolitan Toronto and Mississauga save and except Assistant Supervisors, Supervisors, persons above the rank of Supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (39 employees in the unit). (*Certified*).

Unit #2: “all garage employees of the Respondent in Metropolitan Toronto and Mississauga regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except Assistant Supervisors, Supervisors and persons above the rank of Supervisor.” (5 employees in the unit). (*Dismissed*).

1894-79-R: United Steelworkers of America (Applicant) v. Brighton Valve, A Unit of ITT Grinnell, Division of ITT Industries of Canada Ltd. (Respondent).

Unit: “all employees of the respondent in Brighton, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (35 employees in the unit). (*Having regard to the agreement of the parties*).

1921-79-R: Oil, Chemical & Atomic Workers International Union (Applicant) v. Wyeth Ltd./Ltee (Respondent).

Unit: “all warehouse employees of the respondent at Downsview, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff, temporary employees, students employed during the school vacation period and persons regularly employed for not more than 24 hours per week.” (7 employees in the unit). (*Having regard to the agreement of the parties*).

1922-79-R: United Steelworkers of America (Applicant) v. Columbus McKinnon Limited (Respondent).

Unit: “all employees of the respondent at Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

1939-79-R: Printing Specialties & Paper Products Union, Local 466 (Applicant) v. Oxford Pendaflex Canada Limited (Respondent).

Unit: “all employees of the respondent at its Dymo of Canada Ltd. division in the City of Mississauga, save and except foremen, persons above the rank of foreman, office and clerical staff, sales employees and students employed during the school vacation period.” (26 employees in the unit). (*Having regard to the agreement of the parties*).

1956-79-R: Canadian Brotherhood of Railway Transport and General Workers (Applicant) v. Travelways School Transit Ltd. (Owen Sound Division) (Respondent).

Unit: “all employees of Travelways School Transit Ltd. (Owen Sound Division) save and except foremen, manager, persons above the rank of manager, and office and sales staff.” (50 employees in the unit).

1955-79-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Applicant) v. St. Raphael's Nursing Homes Limited (Respondent) v. Employee (Objector).

Unit: "all employees of St. Raphael's Nursing Homes Limited at Kitchener, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except foremen, supervisors, persons above the rank of foreman and supervisor, professional nursing staff and office staff." (36 employees in the unit). (*Having regard to this agreement*).

1957-79-R: United Steelworkers of America (Applicant) v. Behlen Wickes Company Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Burlington, save and except foremen, persons above the rank of foreman, and office and sales staff." (63 employees in the unit). (*Having regard to the agreement of the parties*). (*Clarity noted*).

1958-79-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. TDL Woodtreating Ltd. (Respondent).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and clerical staff." (8 employees in the unit). (*Having regard to the agreement of the parties*).

1969-79-R: Canwood Lachute Employees' Association (Applicant) v. Canwood Lachute, Division of York Transport Equipment Ltd. (Respondent).

Unit: "all employees of the respondent in Orillia, Ontario save and except foremen and persons above the rank of foreman, office and sales staff." (33 employees in the unit). (*Having regard to the agreement of the parties*).

1978-79-R: Ontario Nurses' Association (Applicant) v. Penetanguishene General Hospital (Respondent).

Unit #1: "all lay registered and graduate nurses employed in a nursing capacity by the respondent at Penetanguishene save and except Head Nurses, persons above the rank of Head Nurse and persons regularly employed for not more than 24 hours per week." (29 employees in the unit). (*Having regard to the agreement of the parties*). (*Dismissed*).

Unit #2: "all lay registered and graduate nurses regularly employed for not more than 24 hours per week in a nursing capacity by the respondent at Penetanguishene, save and except Head Nurses and persons above the rank of Head Nurse." (15 employees in the unit). (*Having regard to the agreement of the parties*).

1988-79-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Lavern Asmussen Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Counties of Oxford, Perth, Huron, Middlesex, Bruce and Elgin, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

2001-79-R: Labourers' International Union of North America, Local 837 (Applicant) v. Aiton Power Limited (Respondent).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

2002-79-R: Canadian Union of Public Employees (Applicant) v. Richmond Nursing Homes Inc. Operating Manitoulin Nursing Home (Respondent).

Unit: “all employees of The Manitoulin Nursing Home Incorporated, Gore Bay, Ontario in the District of Manitoulin, save and except Professional Medical Staff, Graduate Nursing Staff, Supervisors, and persons above the rank of supervisor.” (29 employees in the unit). (*Having regard to the agreement of the parties*).

2004-79-R: United Brotherhood of Carpenters & Joiners of America Local 494 (Applicant) v. Tacon Construction A Division of P. AC Limited (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in the unit).

2005-79-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Saunders Leasing System of Canada Limited (Respondent).

Unit: “all employees of the respondent at Brantford, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (11 employees in the unit). (*Having regard to the above conclusion*).

2019-79-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC (Applicant) v. Canada Cordage Inc. (Respondent).

Unit: “all employees of Canada Cordage Inc., in the Regional Municipality of Waterloo, save and except foremen, foreladies, persons above the rank of foreman and forelady, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (183 employees in the unit). (*Having regard to this agreement*).

2025-79-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Brooke Bond Foods Limited (Respondent).

Unit: “all employees of the respondent working in Metropolitan Toronto, save and except foremen, those above the rank of foreman, cafeteria staff, office and sales staff.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

2026-79-R: Canadian Union of Public Employees (Applicant) v. St. Joseph’s General Hospital (Respondent).

Unit #1: “all lay employees of the respondent at Blind River, Ontario, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate pharmacists, graduate dietitians, students dietitians, technical personnel, supervisors, foremen, persons above the rank of supervisor and foreman, secretary to the administrator, secretary to the directory of nursing, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (46 employees in the unit). (*Having regard to the agreement of the parties*).

Unit #2: “all lay employees of the respondent at Blind River, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except professional medical staff, graduate nursing staff, undergraduate nurses, graduate

pharmacists, graduate dietitians, student dietitians, technical personnel, supervisors, foremen, persons above the rank of supervisor and foreman, secretary to the administrator, and secretary to the director of nursing." (20 employees in the unit). (*Having further regard to the agreement of the parties*).

2039-79-R: Service Employees International Union, Local 663, A.F. of L., C.I.O., C.L.C. (Applicant) v. Belleville General Hospital (Respondent).

Unit: "all employees of Belleville General Hospital at Belleville, Ontario, employed for not more than 24 hours per week and students employed during the school vacation period as registered technologists, laboratory, radiology, electrodiagnostic services and nuclear medicine technicians, physiotherapy and occupational therapy aides, laboratory assistants and phlebotomists, pharmacy assistant and technical assistant-pharmacy save and except graduate pharmacists, supervisors, persons above the rank of supervisor, chief technologist laboratory, radiology and nuclear medicine, chief instructors of laboratory and radiology, charge technologists, students in training, and persons covered by subsisting collective agreements." (12 employees in the unit). (*Having regard to the agreement of the parties*).

2041-79-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union AFL-CIO-CLC (Applicant) v. Religious Hospitallers of St. Joseph of Villa Maria (Respondent).

Unit: "all lay employees of the Religious Hospitallers of St. Joseph of Villa Maria at the Villa Maria Home for the Aged at Windsor, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except professional medical staff, graduate nursing staff, graduate pharmacists, graduate dieticians, supervisors, persons above the rank of supervisor, office staff and persons covered by subsisting collective agreements." (25 employees in the unit).

2052-79-R: Ontario Public Service Employees Union (Applicant) v. Mississauga Association for the Mentally Retarded (Respondent).

Unit: "all employees working in or out of Mississauga Association for the Mentally Retarded, Mississauga, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except the executive director, administrative coordinator, controller, director of residential services, director of transportation, director of vocational services, director of preschool services, manager of Dixie Woodworks, manager of ARC Industries, manager of Pack-It, manager of Print One, supervisor of Given Road Residence, supervisor of Haig Residence, supervisor of Creditview Residence, supervisor of Lakeshore Residence, secretary to the director of vocational services, preschool secretary, residential services secretary and payroll/personnel clerk." (15 employees in the unit). (*Having regard to the agreement of the parties*).

2059-79-R: Ontario Public Service Employees Union, Mini-Skools Limited (Respondent).

Unit: "all employees of the respondent at 3153 Cawthra Road, Mississauga, Ontario, save and except assistant supervisor, persons above the rank of assistant supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (23 employees in the unit). (*Having regard to the agreement of the parties*).

2060-79-R: Ontario Public Service Employees Union (Applicant) v. Mini-Skools Limited (Respondent).

Unit: “all employees of the respondent at 2488 Bromsgrove in Mississauga, Ontario, save and except assistant supervisor, persons above the rank of assistant supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (22 employees in the unit). (*Having regard to the agreement of the parties*).

2063-79-R: Teamsters Local Union 2175, Chemical, Energy & Allied Workers Division, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Niagara Falls Union Centre (Respondent).

Unit: “all employees of the respondent in Niagara Falls, Ontario, save and except persons who exercise managerial functions or persons employed in a confidential capacity in matters relating to labour relations.” (17 employees in the unit).

2065-79-R: United Steelworkers of America (Applicant) v. Gama Sales and Services Limited (Respondent).

Unit: “all employees of the respondent in Pembroke employed as oil burner technicians and truck drivers, save and except assistant manager, persons above the rank of assistant manager, office and sales staff.” (7 employees in the unit).

2072-79-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local Union 721 (Applicant) v. Climb Form Works Ltd. (Respondent).

Unit. “all reinforcing rodmen in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

2078-79-R: The United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Carrier Construction (Respondent).

Unit: “all carpenters and carpenters’ apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

2079-79-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.) v. Can-Eng Metal Treating Ltd. – Alloys Division (Respondent).

Unit: “all employees of the respondent in Paris, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and students employed as part of a university co-operative programme.” (30 employees in the unit).

2087-79-R: Chatham Construction Workers Association, Local No. 53, affiliated with the Christian Labour Association of Canada (Applicant) v. Don Ellis Construction Limited (Respondent).

Unit: “all electricians and electricians’ apprentices in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit). (*Having regard to the foregoing*).

2088-79-R: International Brotherhood of Electrical Workers Local Union 1687 (Applicant) v. Nuclear Electric Limited (Respondent).

Unit: "all electricians and electricians' apprentices in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

2095-79-R: United Steelworkers of America (Applicant) v. Kinnear Industries Corporation Limited (Respondent).

Unit #1: "all employees of the respondent in Cambridge, save and except foremen, persons above the rank of foreman, office and sales staff and persons regularly employed for not more than twenty-four hours per week." (20 employees in the unit).

Unit #2: "all employees of the respondent in Cambridge who are regularly employed for not more than twenty-four hours per week, save and except foremen, persons above the rank of foreman, office and sales staff." (7 employees in the unit). (*Clarity noted*).

2104-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. Wiscot Manufacturing Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Grimsby, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (30 employees in the unit). (*Having regard to the agreement of the parties*).

2110-79-R: Christian Labour Association of Canada (Applicant) v. Frusino Structure Inc. (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the County of Ontario except the Townships of Pickering, Rama, and Mara) and the County of Durham (except the Township of Hope), save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

2118-79-R: International Association of Bridge, Structural and Ornament Ironworkers, Local Union 721 (Applicant) v. Inch Mechanical Ltd. (Respondent).

Unit: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the County of Ontario (except the Township of Pickering, Rama and Thorah) and the County of Durham (except the Township of Hope) save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in the unit).

Application Certified Subsequent to Pre-Hearing Vote

1937-79-R: International Woodworkers of America (Applicant) v. B. & S. Furniture Manufacturing Limited (Respondent).

Unit: "all employees of the respondent in Toronto, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (25 employees in the unit).

Number of names of persons on list originally prepared by employer		25
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant	14	
Number of ballots marked against applicant	8	

1959-79-R: Service Employees International Union, Local 183 A.F. of L., C.I.O., C.L.C. (Applicant) v. Balmoral Lodge Limited (Respondent).

Unit: "all employees of the respondent in Peterborough, Ontario, save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (42 employees in the unit).

Number of names of persons on list originally prepared by employer		33
Number of persons who cast ballots	31	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	13	

Applications Certified Subsequent to Post-Hearing Vote

1014-79-R: Restaurant, Cafeteria and Tavern Employees Union, Local 254, of the Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. Domco Foodservices Limited (Respondent) v. Retail Clerks Union, Local 409 (Intervener).

Unit: "all employees of the respondent at the St. Joseph Manor Complex in Thunder Bay, Ontario, save and except Assistant Managers, persons above the rank of assistant manager and office staff." (9 employees in the unit).

Number of names of persons on revised voters' list		59
Number of persons who cast ballots	38	
Number of ballots marked in favour of applicant	29	
Number of ballots marked against the applicant	9	

1440-79-R: Alliance Des Enseignants de la Toronto French School (Applicant) v. The Toronto French School (Respondent).

Unit #2: "all teaching staff of the respondent at Metropolitan Toronto and Mississauga regularly employed for not more than 24 hours per week, save and except Headmaster and Principal, Branch Supervisors, Librarian, Lab Technicians and persons solely engaged in a clerical, administrative or support capacity." (31 employees in the unit).

Number of names of persons on list as originally prepared by employer	34	
Number of persons who cast ballots		18
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	15	
Number of ballots marked against applicant	2	

(Bargaining Unit #1 – See Bargaining Units Certified – No Vote Conducted).

1666-79-R: Canadian Union of Public Employees (Applicant) v. The Children's Aid Society of Brant (Respondent) v. Employee (Objector).

Unit #2: "all employees of the Children's Aid Society of Brant, in the City of Brantford, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except the Director, Assistant Director, Supervisors, persons above the rank of supervisor, secretary to the executive director and persons employed at its Branch Office in Ohsweken." (10 employees in the unit).

Number of names of persons on revised voters' list		10
Number of persons who cast ballots		10
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	2	

(Bargaining Unit #1 – See Bargaining Certified – No Vote Conducted).

1800-79-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the Town of Caledon (Respondent v. Group of Employees (Objectors)).

Unit: "all employees of the Corporation of the Town of Caledon in the Town of Caledon, Ontario, save and except foremen, managers, persons above the rank of foremen or managers, office, clerical and technical staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (43 employees in the unit).

Number of names of persons on list as originally prepared by employer		43
Number of persons who cast ballots		42
Number of ballots marked in favour of the applicant	24	
Number of ballots marked against the applicant	18	

APPLICATIONS FOR CERTIFICATION DISMISSED

No Vote Conducted

0964-79-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Astro Interior Finishing Co. Ltd. (Respondent). (2 employees).

1006-79-R: United Brotherhood of Carpenters and Joiners of America, Local Union 446 (Applicant) v. Relac Construction Limited (Respondent). (6 employees).

1834-79-R: United Steelworkers of America (Applicant) v. Gama Sales and Service Limited (Respondent). (3 employees).

1868-79-R: Faultless-Doerner Manufacturing Inc., Stratford, Ontario Employees Association (Applicant) v. Faultless-Doerner Manufacturing Inc. (Respondent). (37 employees).

1893-79-R: The Association of Labourers, Painters Platers and Plastic Workers (Applicant) v. Barrie J. Lawrence Management Ltd. (Respondent) v. United Cement, Lime & Gypsum Workers International Union (Intervener). (43 employees).

1933-79-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers (Applicant) v. Action Millwright Service Ltd. (Respondent). (5 employees).

1950-79-R: Christian Labour Association of Canada (Applicant) v. Corporation of the City of Chatham (Respondent). (3 employees).

2054-79-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths Forgers and Helpers, Local #128 (Applicant) v. Neono Limited (Respondent) v. Group of Employees (Objectors). (10 employees).

2064-79-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmith, Forgers and Helpers, Local #128 (Applicant) v. Progress Fab Limited (Respondent). (6 employees).

Certification Dismissed Subsequent to Pre-Hearing Vote

1600-79-R: Canadian Textile and Chemical Union (Applicant) v. Silknit Limited (Textile Division) (Respondent) v. United Textile Workers of America (Intervener).

Voting Constituency: "All employees of Silknit Limited at Cambridge (Hespeller), save and except foremen and foreladies, persons above the rank of foreman and forelady, office staff and persons regularly employed for not more than twenty-four (24) hours per week." (300 employees).

Number of names of persons on revised voters's list		361
Number of persons who cast ballots	325	
Ballots segregated and not counted	13	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	143	
Number of ballots marked in favour of intervener	168	

Certification Dismissed Subsequent to Post-Hearing Vote

1861-78-R: International Ladies' Garment Workers' Union (Applicant) v. B. Marco Garment Company Inc. (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson and office and sales staff." (22 employees in the unit).

Number of persons on revised voters' list		15
Number of persons who cast ballots	14	
Number of spoiled ballots	2	
Number of ballots marked in favour of the applicant	0	
Number of ballots marked against the applicant	12	

1270-79-R: Ontario Nurses' Association (Applicant) v. The Regional Municipality of Durham (Respondent) v. Group of Employees (Objectors).

Unit: "all registered and graduate nurses employed in a nursing capacity by The Regional Municipality of Durham at Hillsdale Manor in Oshawa, save and except the Director of Nursing and persons above the rank of Director of Nursing." (35 employees in the unit).

Number of names of persons on revised voters' list		18
Number of persons who cast ballots	19	
Ballots segregated and not counted	1	
Number of spoiled ballots	0	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	9	

1531-79-R: United Brotherhood of Carpenters and Joiners of America – Millworkers Local 802 (Applicant) v. L. Kimball Building Supplies Limited (Respondent).

Unit: "all employees of the respondent at Essex, Ontario, save and except foremen, persons above the rank of foreman, outside sales and office staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (8 employees in the unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	5	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

1772-79-R: Greater Northern Ontario Trucking Association (Applicant) v. T.C.G. Materials Limited (Respondent) v. Group of Employees (Objectors). (9 employees).

1910-79-R: Greater Northern Ontario Trucking Association (Applicant) v. Lincoln Quarries Division of King Paving & Materials a Division of the Flintkote Company of Canada Limited (Respondent). (14 employees).

1996-79-R: Toronto Motion Picture Projectionists Union, Local No. 173 of the International Alliance Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada (Applicant) v. Darshan S. Sahota, carrying on business under the names and styles of Donlands Theatre, Landsdowne Theatre and Paradise Theatre (Respondent). (3 employees).

2053-79-R: Hotel and Restaurant Employees and Bartenders International Union Local 412 (Applicant) v. C. P. M. Investments c/o Rico Palarchio 116 Spring St./c/o Rico Palarchio, P6A 3A1 (Respondent). (2 employees).

2061-79-R: United Brotherhood of Carpenters and Joiners of America Local Union 2679 (Applicant) v. D. Kemp Edwards Limited (Respondent). (36 employees).

2164-79-R: United Steelworkers of America (Applicant) v. Midnorthern Appliance Industries Corp. (Respondent). (37 employees).

APPLICATION UNDER SECTION 1(4)

0153-77-R: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 124, Ottawa-Hull (Applicant) v. Zaph Construction Ltd., Elru Payroll Company Limited, Demiro Construction Limited and Sardina Investments Limited (Respondents) v. Labourers' International Union of North America, Local 527 (Intervener). (*Withdrawn*).

APPLICATION UNDER THE EMPLOYEES HEALTH & SAFETY ACT

2030-79-U: Joe Texiera (Complainant) v. Sonco Steel Tube Ltd. (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0324-79-R: William De Marsh (Applicant) v. Hotel & Restaurant Employees & Bartenders Union, Local 604, A.F.L., C.I.O., C.L.C. (Respondent) v. Empress Hotel (Intervener). (*Granted*).

Unit: "all waiters, bartenders, and tapmen employed by the employer at its beverage rooms or cocktail lounges at the Empress Hotel at Peterborough, Ontario, save and except department managers, persons above the rank of department managers and persons regularly employed for not more than fourteen (14) hours per week." (5 employees in the unit).

Number of names of persons on list as originally prepared by the employer		1
Number of persons who cast ballots		1
Number of ballots marked in favour of the respondent	0	
Number of ballots marked against the respondent	1	

1404-79-R: Sudbury Service Employees (Applicant) v. The International Association of Machinists and Aerospace Workers (Respondent). (*Granted*).

Unit: "all employees of the Toledo Scale Division – Reliance Electric at the Sudbury District Office, save and except Service Managers, Assistant Service Managers, persons above the rank of Service Manager and office and sales staff." (2 employees in the unit).

Number of names of persons on list as originally prepared by employer		2
Number of persons who cast ballots		2
Number of ballots marked in favour of the respondent	0	
Number of ballots marked against the respondent	2	

1611-79-R: Don Speilmacher, Al Dettweiler and Douglas Brohman (Applicants) v. The Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 173 (Respondent) v. Kitchener Beverages Limited (Intervener). (*Granted*).

Unit: "all employees of Kitchener Beverages Limited at the Kitchener Plant, save and except foremen and supervisors, persons above the rank of foreman and supervisor, office staff, salesmen other than driver salesmen, persons regularly employed for not more than twenty-four hours per week and students hired for the school vacation period." (49 employees in the unit).

Number of names of persons on revised voters' list		47
Number of persons who cast ballots	39	
Number of ballots marked in favour of the respondent	3	
Number of ballots marked against the respondent	36	

1612-79-R: Metropolitan Wire Employees (Applicant) v. Laundry and Linen Drivers and Industrial Workers Local 847 (Respondent) v. Metropolitan Wire (Canada) Ltd. (Intervener). (*Granted*).

Unit: "all employees of Metropolitan Wire (Canada) Ltd. in Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office staff, sales staff and outside contracted services." (22 employees in the unit).

Number of names of persons on list as originally prepared by employer		24
Number of persons who cast ballots	24	
Number of spoiled ballots	1	
Number of ballots marked in favour of the respondent	4	
Number of ballots marked against the respondent	19	

1622-79-R: Richard Kent, James Gilles and the Employees of Weston Bakeries Limited, London Branch (Applicants) v. Milk and Bread Drivers, Dairy Employees, Caterers, and Allied Employees, Local Union No. 647 (Respondent) v. Weston Bakeries Limited (Intervener). (*Granted*).

Unit: "all employees of Western Bakeries Limited at its London, Ontario branch, save and except route foremen, persons above the rank of route foreman, and office staff." (22 employees in the unit).

Number of names of persons on list as originally prepared by employer		21
Number of persons who cast ballots	21	
Number of ballots marked in favour of the respondent	1	
Number of ballots marked against the respondent	20	

1654-79-R: Reta Arlene Behm & Bonnie Lee Stainistreet (Applicants) v. Canadian Union of Public Employees Local 2103 (Respondent) v. 336496 Ontario Limited, (operating Grove Park Lodge) (Intervener). (25 employees). (*Dismissed*).

1688-79-R: Gerry H. Schoemaker (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 3054 (Respondent) v. Selinger Wood Ltd. (Intervener). (37 employees). (*Dismissed*).

1762-79-R: John Robert Manser (Applicant) v. Canadian Union of Operating Engineers & General Workers, Local 101 (Respondent). (*Dismissed*).

Unit: "all employees of Domglas Inc., 100 West Drive, Bramalea, City of Bramalea, County of Peel, engaged as stationary engineers, compressor operators and persons primarily engaged as their helpers in the systems room and boiler room." (5 employees in the unit.)

Number of names of persons on revised voters' list		4
Number of persons who cast ballots	4	
Number of ballots in favour of the respondent	2	
Number of ballots marked against the respondent	2	

1856-79-r: J. Wackett and a Group of Employees (Applicant) v. Christian Labour Association of Canada (Respondent). (26 employees). (*Granted*).

1914-79-R: Earl Franklin Mitchell (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent). (1 employee). (*Dismissed*).

1968-79-R: Dina Papadokos (Applicant) v. International Ladies' Garment Workers' Union (Respondent) v. New-Port Sportswear Ltd. (Intervener). (131 employees). (*Dismissed*).

2017-79-R: William H. Murray (Applicant) v. Hotel & Restaurant Employees' Union Local 756 (Respondent) v. The Firestone War Veterans' Association (Intervener). (1 employee). (*Dismissed*).

APPLICATIONS FOR DECLARATION OF SUCCESSOR STATUS

1938-79-R: The Canadian Union of Public Employees (Applicant) v. Family and Children's Services of the Niagara Region (Respondent). (*Granted*).

1984-79-R: United Food and Commercial Workers International Union (Applicant) v. Mohawk Creamery Limited (Respondent). (*Granted*).

APPLICATION FOR DECLARATION THAT STRIKE UNLAWFUL

2082-79-U: Pazner Scrap Metals Co. Ltd. (Applicant) v. Frank Roberts et al (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL

1907-79-U: Ontario Taxi Association Canadian Labour Congress (Applicant) v. Glen Taxi 1978 Ltd. (Respondent). (*Withdrawn*).

1908-79-U: Ontario Taxi Association 1688 Canadian Labour Congress (Applicant) v. Glen Taxi 1978 Ltd. (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

0659-79-U; Ontario Nurses' Association (Applicant) v. Grey-Owen Sound Health Unit (Respondent). (*Dismissed*).

1077-79-U: Ontario Nurses' Association (Applicant) v. Grey-Owen Sound Health Unit (Respondent). (*Dismissed*).

2081-79-U: Pazner Scrap Metals Co. Ltd. (Applicant) v. Frank Roberts et al (Respondents). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

2100-76-U: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 124, Ottawa-Hull (Complainant) v. Bernardo Carozzi and Labourers' International Union of North America (C.L.C. (A.F.L.-C.I.O.) Local 527 (Respondents) v. Zaph Construction Limited (Intervener). (*Withdrawn*).

0741-79-U: William M. Pipher (Complainant) v. Atlantic Bus Lines Inc. (Respondent). (*Dismissed*).

1076-79-U: Ontario Nurses' Association (Applicant) v. Grey-Owen Sound Health Unit (Respondent). (*Granted*).

1175-79-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Geo. Lanthier & Fils Limitee (Respondent). (*Withdrawn*).

1190-79-U: Ontario Taxi Association 1688 Canadian Labour Congress (Complainant) v. Windsor Airline Limousine Services Limited carrying on business as Veteran Cab Company (Respondent). (*Granted*).

1221-79-U: Canadian Food & Allied Workers, Local 175 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO-CLC (Complainant) v. Valdi Inc. (trading as Valdi Discount Foods) (Respondent). (*Withdrawn*).

1249-79-U: National Union of Independent Gas Workers (Complainant) v. The Consumers' Gas Company (Respondent). (*Withdrawn*).

1266-79-U: Ontario Taxi Association 1688 Canadian Labour Congress (Complainant) v. Windsor Airline Limousine Services Limited carrying on business as Veteran Cab Company (Respondent). (*Granted*).

1267-79-U: Ontario Taxi Association 1688 Canadian Labour Congress (Complainant) v. Windsor Airline Limousine Services Limited carrying on business as Veteran Cab Company (Respondent). (*Granted*).

1277-79-U: Canadian Food & Allied Workers, Local 175 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO-CLC (Complainant) v. Valdi Inc. (trading as Valdi Discount Foods) (Respondent). (*Withdrawn*).

1278-79-U: Canadian Food & Allied Workers, Local 175 chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO-CLC (Complainant) v. Valdi Inc. (trading as Valdi Discount Foods) (Respondent). (*Withdrawn*).

1378-79-U: Joshua Dockery (Complainant) v. Canadian Guards Association, Local 107 (Respondent). (*Dismissed*).

1420-79-U: Service Employees' Union, Local 210 (Complainant) v. National Traveller Hotel (Respondent). (*Withdrawn*).

1421-79-U: Service Employees' Union, Local 210 (Complainant) v. National Traveller Hotel (Respondent). (*Withdrawn*).

1421-79-U: Service Employees' Union, Local 210 (Complainant) v. National Traveller Hotel (Respondent). (*Withdrawn*).

1496-79-U: Toronto Typographical Union No. 91 (I.T.U.) (Complainant) v. Accutext Limited (Respondent).

- and -

1741-79-U: Toronto Typographical Union No. 91 (I.T.U.) (Complainant) v. Accutext Limited (Respondent).

- and -

1742-79-U: Toronto Typographical Union No. 91 (I.T.U.) (complainant). v. Accutext Limited Respondent).

- and -

1803-79-U: Toronto Typographical Union No. 91 (I.T.U.) (Complainant) v. Accutext Limited (Respondent). (*Dismissed*).

1563-79-U: Retail Clerks Union, Local 206 Chartered by the Retail Clerks International Union (Complainant) v. Canadian Facts Co. Limited (Respondent). (*Withdrawn*).

1632-79-U: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Browning-Ferris Industries of Toronto Ltd. Resource Recovery Division (Respondent). (*Withdrawn*).

1651-79-U: Canadian Union of Public Employees (Complainant) v. Elsie Able Enterprises Limited, carrying on business under the name "Casselman Nursing Home" (Respondent). (*Granted*).

1737-79-U: Graphic Arts International Union, Local 542 (Complainant) v. Johanns Graphics Limited (Respondent). (*Withdrawn*).

1748-79-U: Thomas Vincent Doucette (Complainant) v. Local 1785 The Canadian Union of Public Employees, its Executive Officers and members of its Grievance Committee (Respondent). (*Withdrawn*).

1792-79-U: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C. (Complainant) v. Rest Haven Nursing Home of St. Williams 1974 Ltd. (Respondent). (*Withdrawn*).

1802-79-U: Morley Marshall (Complainant) v. The Ottawa-Carleton Public Employees Union Local 503, Canadian Union of Public Employees (C.L.C.) and The Corporation of the City of Ottawa (Respondents). (*Dismissed*).

1854-79-U: Kenneth McLaren (Complainant) v. Amalgamated Transit Union Local #107 (Respondent). (*Terminated*).

1855-79-U: Mrs. Maureen Clark (Complainant) v. Mr. Steven Watt (Respondent). (*Withdrawn*).

1874-79-U: United Cement, Lime & Gypsum Workers International Union (Complainant) v. Havco Foods (Respondent). (*Withdrawn*).

1913-79-U: Greater Northern Ontario Trucking Association (Complainant) v. T.C.G. Materials Limited (Respondent). (*Withdrawn*).

1915-79-U: Jan Peters Limited (Complainant) v. International Union of Operating Engineers Local 793 (Respondent). (*Withdrawn*).

1946-79-U: United Food and Commercial Workers International Union (Complainant) v. Tilden Rent-A-Car Company (Respondent). (*Granted*).

- and -

2008-79-U: United Food and Commercial Workers International Union (Complainant) v. Tilden Rent-A-Car Company (Respondent). (*Terminated*).

- and -

2009-79-U: United Food and Commercial Workers International Union (Complainant) v. Tildlen Rent-A-Car Company (Respondent). (*Terminated*).

1961-79-U: John Smith (Complainant) v. United Steelworkers of America (Respondent). (*Withdrawn*).

1965-79-U: Service Employees Union, Local 183 (Complainant) v. Carveth Care Centre (Respondent). (*Withdrawn*).

1987-79-R: Local 1976, Pharmacists and Professional Employees Association, CLC, AFL-CIO (Complainant) v. The Regional Municipality of Haldimand-Norfolk (Grandview Lodge) (Respondent). (*Withdrawn*).

1999-79-U: Service Employees Union, Local 204 (Complainant) v. Canada Catering Company Limited (Respondent). (*Withdrawn*).

2020-79-U: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Woodington Systems Incorporated (Respondent). (*Withdrawn*).

2021-79-U: Canadian Union of Operating Engineers and General Workers (Complainant) v. Riverside Hospital of Ottawa (Respondent). (*Withdrawn*).

2022-79-U: International Woodworkers of America (Complainant) v. Mercedes Textile Limited (Respondent). (*Withdrawn*).

2034-79-U: Herman Faria (Complainant) v. Chrysler Canada Limited, National Parts Depot (Respondent). (*Withdrawn*).

2048-79-U: Ontario Nurses' Association (Complainant) v. The Board of Health of the Leeds, Grenville & Lanark District Health Unit (Respondent). (*Withdrawn*).

2074-79-U: Laundry, Dry Cleaning and Dye House Workers' International Union, Local 351 (Complainant) v. Four Seasons Hotel, Belleville (Respondent). (*Withdrawn*).

2092-79-U: Canadian Union of Public Employees (Complainant) v. Manitoulin Nursing Home Incorporated (Respondent). (*Withdrawn*).

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1945-79-M: Work Wear Corporation of Canada Ltd. (Stericloth Division) (Trade Union) v. Laundry, Dry Cleaning and Dye House Workers International Union, Local 351 (Employer). (*Granted*).

1971-79-M: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW) and its Local 1620 (Trade Union) v. Fleck Manufacturing Company (Employer). (*Granted*).

1973-79-M: Canadian Union of Public Employees, Local 6 (Trade Union) v. Corporation of the Town of Nickel Centre (Employer). (*Granted*).

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1730-79-R: The Ontario Council of the International Brotherhood of Painters and Allied Trades and the International Brotherhood of Painters and Allied Trades (Applicants) v. Coleman Cinkant & Son, Ltd. and Bob Cinkant Painting Limited (Respondents). (*Granted*).

1897-79-R: The International Brotherhood of Electrical Workers (Applicant) v. Welland Hydro-Electric Commission (Respondent). (*Terminated*).

1898-79-R: Local 636 of the International Brotherhood of Electrical Workers (Applicant) v. Newcastle Hydro-Electric Commission (Respondent). (*Granted*).

1899-79-R: Local 636 of the International Brotherhood of Electrical Workers (Applicant) v. Ajax Hydro-Electrical Commission (Respondent). (*Granted*).

1902-79-R: The International Brotherhood of Electrical Workers, Local 636 (Applicant) v. St. Catharines Hydro-Electric Commission (Respondent). (*Terminated*).

1903-79-R: The International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Niagara Falls Hydro-Electrical Commission (Respondent). (*Granted*).

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1387-79-M: Peterborough County – City Health Unit (Applicant) v. Ontario Nurses' Association (Respondent). (*Granted*).

1613-79-M: The Regional Municipality of Waterloo (Sunnyside Home) (Applicant) v. Ontario Nurses Association (Respondent). (*Withdrawn*).

1720-79-M: Collingwood General and Marine Hospital (Employer) v. Service Employees International Union, Local 204 (Trade Union). (*Withdrawn*).

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1871-79-M: International Union of Operating Engineers, Local 772 (Trade Union) v. Selinger Wood Limited (Employer). (*Terminated*).

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2097-78-M: Labourers' International Union of North America, Local 506 (Applicant) v. Napev Construction Limited and General Contractors Section, Toronto Construction Association (Respondents). (*Granted*).

1015-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Lindsay Crane Rentals Ltd. (Respondents). (*Withdrawn*).

1021-79-M: Labourers' International Union of North America, Local 183 (Applicant) v. Underground Services Limited (Respondent). (*Withdrawn*).

1418-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. G. & H. Mechanical (Respondent). (*Granted*).

1712-79-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. J. D. S. Investments Ltd. (Respondent). (*Granted*).

1740-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463 (Applicant) v. Harold R. Stark Limited (Respondent). (*Withdrawn*).

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1885-79-M: Chatham Construction Workers Association, Local No. 53 Affiliated with The Christian Labour Association of Canada (Applicant) v. CFA Operations Incorporated (Respondent). (*Withdrawn*).

1888-79-M: The Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. Coleman Cinkant & Son, Ltd. and Bob Cinkant Painting Limited (Respondents). (*Granted*).

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1962-79-M: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Lamparter Mechanical Contractors; The Association of Millwrighting Contractors of Ontario (Respondents). (*Granted*).

1989-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Lamparter Mechanical Contractors Ltd. (Respondent). (*Granted*).

1991-79-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Convert-A-Wall Limited (Respondent). (*Withdrawn*).

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A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1980] OLRB REP.

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1491-79-U; 1549-79-U; 1574-79-U; 1606-79-U; 1571-79-R Canadian Union of Public Employees, Applicant/Complainant v. **ABC Day Nursery and Kindergarten Limited**, Respondent, v. Group of Employees, Objectors.

Certification – Discharge for Union Activity – Section 7a invoked to certify – Board ordering reinstatement of employees and posting of notices

BEFORE: Ian C. A. Springate, Vice-Chairman and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Guy Beaulieu and Madeline Anderson for the applicant/complainant; Robert D. Howe, Richard Holmes, and Carol Jewell for the respondent; D. S. Jovanovic, Mary Pastorius and Lucille Emery for the objectors.*

DECISION OF THE BOARD; April 22, 1980

1. File Nos. 1491-79-U, 1549-79-U, 1574-79-U and 1606-79-U are complaints under section 79 of *The Labour Relations Act* which allege that a total of ten grievors were dealt with by the respondent contrary to the provisions of sections 3, 56 and 58 of the Act. File No. 1571-79-R is an application for certification in which the applicant trade union has requested that it be certified as the bargaining agent for a unit of the respondent's employees pursuant to the provisions of section 7a of the Act.

2. In support of its request to be certified pursuant to section 7a, the union relied upon the same matters raised in the section 79 complaints. On agreement of all parties, the Board first heard the evidence of the parties with respect to the section 79 complaints on the understanding that this evidence would later be taken into account by the Board when considering the union's request that it be certified pursuant to section 7a. Because of this method of proceeding, the group of employees objecting to the application for certification were accorded full standing to participate in that part of the hearing dealing with the section 79 complaints.

3. The respondent operates a modern and highly regarded day-nursery operation in the City of Windsor. At the relevant time it operated three separate nursery schools in Windsor, generally referred to as the Hanna School, the Somme School and the South Windsor School. The respondent's director is Mr. Richard Holmes. Directly under Mr. Holmes is Miss Carol Jewell, who since April of 1979 has been classified as the respondent's supervising manager. . . .

[A detailed review of the evidence is omitted.]

59. We turn now to consider the merits of the section 79 complaints insofar as they relate to the ten grievors. Having regard to the provisions of section 79(4a) of the Act, the respondent must satisfy the Board that its actions were in no way motivated by the grievor's support for the union. The Board need not find that the respondent's sole reason for its actions stemmed from the grievors' support for the union to find a violation of the legislation, but rather, the respondent must satisfy the Board that union activity played neither a major nor minor role in regard to its decision to terminate and lay off the various grievors. See: *Field Lumber Company Limited*, [1975] OLRB Rep. Sept. 665; and *R. v. Bushnell*

Communications (1974), 47 D.L.R. (3d) 688 (Ont. C.A.). With respect to the difficult task of determining an employer's true motivation, the Board had the following to say in the *Fielding Lumber* case at page 673:

"However, the Board must only be concerned with the motivation of an employer and cannot pass judgment on the fairness of its actions. The Ontario Labour Relations Board has no general mandate to impose its views of fairness on employers and employees. Its sole responsibility is to administer and enforce The Labour Relations Act – a piece of legislation that does not stipulate that an employee can be terminated from his employment only for just and reasonable cause. But having said this it must also be observed that in assessing an employer's declared motivation due regard may be had to the peculiarities of the context surrounding an employer's actions. To the extent that peculiarities exist and cannot be reasonably explained an employer may fail, by a process of inferential reasoning, to satisfy the burden placed upon it."

60. Two of the first persons to be terminated were Miss Prietz and Miss Janisse. Both of them were active union supporters, and Miss Prietz was the employee most involved with the union's organizing campaign. Although the evidence with respect to certain events is contradictory, it is clear that a number of managerial persons, including Mr. Holmes, had long had serious reservations about the way they performed their jobs and that in the past Mr. Holmes had considered discharging them both. However, despite these facts they had been kept on and only discharged during the currency of the union organizing campaign. The respondent contends this timing of the discharges was coincidental, and that the two were discharged because the respondent felt they would not fit in with its future plans. In this regard, particular stress was put on the Denver test, and Mr. Holmes' feeling that these two employees would not be able to objectively administer it. Against a long-standing concern with their job abilities, this might indeed have been a reasonable basis for Mr. Holmes to decide to terminate their employment when he did. Supporting such a conclusion is the fact that there is no direct evidence that either Mr. Holmes or Miss Jewell were aware of the union organizing campaign when the decision was reached to discharge them. In our view, however, the discharges of Miss Prietz and Miss Janisse cannot be looked at in isolation from the respondent's actions involving the other grievors.

61. Mrs. Weaver was discharged at about the same time as Miss Prietz and Miss Janisse. Mrs. Weaver had been employed by the respondent longer than they had, namely, for four years. It is clear that management was not completely happy with Mrs. Weaver's job performance, and at one point Mr. Holmes had considered discharging her. However, Mrs. Weaver is in a somewhat different position than either Miss Prietz or Miss Janisse. For one thing, Mrs. Weaver was not a teacher but an assistant, and thus did not bear the same degree of responsibility as they did. Further, many of the issues raised to demonstrate Mrs. Weaver's shortcomings, such as the timing of her lunches, spending time talking to a teacher and the incident with the child who fell off the climber all involved other staff who were not discharged. Mrs. Weaver's situation is also different from that of Miss Prietz and Miss Janisse in that Mr. Holmes did not contend that one of the reasons she was discharged was because he did not feel she could not properly administer the Denver test. Whether or not this was because assistants would not be administering the test, we do not know.

62. Miss Pernasilici's termination about the same time as the other three involved a somewhat different fact situation. Few specific incidents were raised concerning her work performance, but then she was a relatively new employee. Further, apart from having signed a card she had not been active in the union's organizing campaign.

63. Mrs. Ball and Miss Ryan were terminated on November 9, 1979. Both of them were assistants and not teachers. Again no claim was made about a concern over their ability to apply the Denver test. Instead, reference was made to the fact that Mrs. Ball was frequently heard yelling, that the room she was in was disorganized, and that the children in the room would often be heard crying. However, the evidence is unrefuted that the teacher responsible for the room, Brenda Mitchell, as well as "Kim", the OCAP student, also engaged in some yelling. Further, as the teacher in the room, Ms. Mitchell had primary responsibility for the organization of the room and proper care for the children, and yet while shortcomings in these areas were raised to justify Mrs. Ball's termination, Ms. Mitchell appears not to have been disciplined at all. In addition, although evidence was led with respect to a parent who had complained about yelling in the room and having picked up his child unchanged, no evidence was led to establish that Mrs. Ball had been doing the yelling complained of or that she bore some particular responsibility for the child not having been changed.

64. With respect to the timing of the discharge of Mrs. Ball, a number of points stand out. Firstly, she was discharged on November 9th, after the union meeting of November 6, 1979 which she had encouraged other staff to attend. Further, it is clear that when Mrs. Ball was discharged, Miss Jewell knew that she had been talking to others about the union meeting. Mr. Holmes, who was on his hunting trip, and Miss Jewell had a telephone conversation on the evening of November 6th, during which Mr. Holmes could have learnt of Mrs. Ball's union activity. Miss Jewell testified that she did not pass on the information about the union to Mr. Holmes because he was on vacation. She admitted, however, that while Mr. Holmes had been on vacation she had discussed both the overdraft situation with him as well as the fact that a parent had decided to withdraw his child. In these circumstances, we feel it highly unlikely that Miss Jewell did not advise Mr. Holmes of the union meeting as well as Mrs. Ball's role in speaking to employees about it.

65. The matters raised by the respondent to explain the discharge of Miss Ryan were, on the main, not very major. Although it is uncontradicted that on one occasion Miss Ryan poorly handled a situation where children had been required to use a staff washroom, the other complaints were essentially that she made comments like "smarten up" and "I haven't got all day", and that she was observed not interacting with the children. There is nothing to indicate that management ever advised Miss Ryan that her language was inappropriate. Further, the evidence establishes that Miss Ryan had been directed by the new teacher in her room not to involve herself with the children as much as she had been doing.

66. The respondent's evidence concerning why it laid off Miss Morin, Ms. Miller and Miss Penny is highly unsatisfactory. Mr. Holmes, who made the decision to lay them off, indicated that the major reason behind the layoff was financial and due to dropping enrolment. In fact, the layoff of the three employees does not appear to have saved the respondent much, if any, money because their layoff required that three supply teachers be employed. Further, at about the same time as the three were laid off, the respondent advertised for new staff and, indeed, less than two weeks after they were laid off (and after com-

plaints had been filed with the Board concerning the layoffs) the respondent recalled both Ms. Miller and Miss Penny. After having heard Mr. Holmes' testimony, including his cross-examination, Miss Jewell indicated that the major reason for the layoff was to see if the staff laid off was the cause of problems in the room where they were working. However, that was not the reason given to the staff by Miss Jewell when she informed them of their layoffs.

67. Miss Raymond was allegedly terminated for her actions on November 9th and for her "attitude". However, on the basis of the testimony of Miss Raymond and Miss Jewell, we are satisfied that the only thing Miss Raymond did on November 9th was to move her personal effects, including a birthday train she had made with her own materials. The evidence comes nowhere close to substantiating Mr. Holmes' claim that she had gone around ripping things off the wall and had disobeyed a direction to leave. No objective evidence at all was led which might indicate a "poor attitude" on Miss Raymond's part. On the other hand, we accept Miss Raymond's testimony that Mr. Holmes stated that he knew she was involved "with this" and that she would be "in just as much trouble as the others". In our view, the only reasonable interpretation which can be put on Mr. Holmes' reference to Miss Raymond's involvement "with this" was her involvement with the union's organizing campaign.

68. Had the respondent taken action against only certain of its employees, such as Miss Prietz and Miss Janisse, it might well have been able to establish to the satisfaction of the Board that it had acted on the basis of long-standing concerns about their job performance, coupled with a concern of their ability to participate in the respondent's planned future programs, and that the fact that the discharges occurred during a union organizing campaign was merely coincidental. However, the evidence put forward to justify the respondent's actions in discharging or laying off other union supporters became progressively less credible. For example, if the respondent's evidence is to be believed, Mrs. Ball was terminated primarily for yelling and for the way in which the room she was in was operating, even though Mrs. Ball was not in charge of the room and the other two staff members in the room also yelled at times. The respondent's reasons for discharging Miss Ryan were even less convincing, particularly in light of the fact that one of the reasons put forward was that she did not involve herself sufficiently with the children, even though she had been specifically directed to lessen her involvement with the children. Mr. Holmes' testimony that he laid off Miss Penny, Ms. Miller and Miss Morin primarily for financial reasons was shown to be untrue. We are also satisfied that the reasons he advanced to explain Miss Raymond's discharge were not the true reasons for her discharge. Having regard to Mr. Holmes' comments to Miss Raymond, we are in fact satisfied that she was discharged because Mr. Holmes suspected, correctly, that she had played some role in the union's organizing campaign. Further, on the basis of Miss Raymond's testimony we are satisfied that Mr. Holmes indicated to her that other employees had been in "trouble" because of their union involvement.

69. Taking into account Mr. Holmes' comments to Miss Raymond, the false reasons advanced by Mr. Holmes to justify the layoff of three employees, as well as the unconvincing reasons put forward to justify the discharges of certain other employees, we are led to the conclusion that Mr. Holmes' actions were motivated, at least in part, by anti-union considerations. This in turn throws into serious doubt the evidence of Mr. Holmes that he acted free from anti-union considerations even with respect to those among the grievors who the respondent might otherwise have had legitimate cause to terminate. It also throws into seri-

ous doubt his claims concerning his lack of knowledge of the union's organizing campaign. This being the case, we are not satisfied that the respondent has met the evidentiary onus placed on it under section 79(4a) with respect to any of the grievors, and accordingly we find that the respondent's actions with respect to each of the grievors involved a violation of section 58 of the Act.

70. Having regard to this conclusion, the Board directs that the respondents reinstate in employment, with compensation for loss of earnings, the following grievors, namely: Elizabeth Prietz, Debra Janisse, Mary Weaver, Betty Pernasilici, Elaine Ryan, Joan Ball, Nicole Morin, and Lu Anne Raymond. The respondent is further ordered to compensate the grievors Joyce Miller and Mary Sue Penny for loss of earnings between the time of their layoff and their recall. In every case, the compensation is to include interest on lost income calculated in accordance with the principles set out in the *Hallowell* case, Board File 0905-79-U, decision dated January 21, 1980. The Board will remain seized of this matter in the event the parties are unable to agree on the amount of compensation involved.

71. We turn now to consider the application for certification.

72. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

73. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in Windsor, Ontario, save and except secretary to the director, supervisors and persons above the rank of supervisor, constitute a unit of employees of the respondent appropriate for collective bargaining.

74. At the hearing the Board indicated that it was prepared to accept certain membership evidence whose acceptability had been put into issue. This membership evidence consists of combination applications for membership and receipts. The application portion indicates over the employee's signature that the employee in question is applying for membership in the union, tendering a dollar "as payment of the initiation fee", and authorizing the union to be the employee's exclusive bargaining agent. Just below this is the receipt portion which reads "on behalf of the above mentioned union, I hereby accept this application and acknowledge receipt of \$ as payment of the initiation fee and first monthly dues", followed by a signature on behalf of the union. The space beside the dollar figure on the receipt is not filled in. Ms. Anderson, who signed all but two of the cards in this condition on behalf of the union, testified that in every case she did in fact receive a dollar from the employees. In that the face of each of the cards indicates that the employee involved tendered \$1.00 as payment of an initiation fee and the receipt portion indicates receipt of some amount as payment of "the initiation fee", we are satisfied that the card as a whole indicates that a dollar initiation fee was paid. Ms. Anderson's oral evidence substantiates that the dollar was in fact paid, and accordingly we are prepared to accept this evidence of membership in those cases where Ms. Anderson acted as collector. For the purposes of these proceedings we will assume no weight should be given to the two remaining cards in this condition where someone else acted as the collector.

75. Taking into account the alterations to the list of employees made necessary by the Board's determination with respect to the section 79 complaints, the Board is satisfied that there were 61 employees in the bargaining unit on the date of the making of the application.

The applicant filed acceptable evidence of membership with respect to 31 of these employees, that is on behalf of approximately fifty per cent of the employees in the bargaining unit.

76. On the basis of the union's membership position, the Board, pursuant to the provisions of section 7(2) of the Act, would normally direct the taking of a representation vote. The applicant, however, has requested that it be certified pursuant to the provisions of section 7a which reads as follows:

"Where an employer or employer's organization contravenes this Act so that the true wishes of the employees of the employer or of a member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

77. As noted earlier, the parties were in agreement that evidence led with respect to the section 79 complaints would be taken into account when considering the applicant's request that it be certified under section 7a. The respondent and the union elected to call no further evidence with respect to the union's request that it be certified pursuant to section 7a. The group of objectors, however, chose to lead certain evidence. Some of this evidence was referred to earlier, namely, the testimony of a number of employees that they did not regard Mr. Holmes' statements at the staff meeting on November 13, 1979 as being referable to the trade union. The other evidence related to a statement of desire or "petition" in opposition to the trade union signed by twenty-five employees in the bargaining unit, three of whom had earlier applied to become members of the trade union. One of the union members who signed the petition was Miss Brenda Johnston, a bus driver. Miss Johnston signed the petition after two employees circulating the petition, namely Miss Mary Pastorius and Miss Debbi Shank, advised her that if the union got in the respondent would either close its doors or cut back its staff, including the bus drivers. Miss Johnston testified she signed the petition because she felt if she did not do so, she would lose her job.

78. The Board has already determined that the respondent violated section 58 of the Act by discharging and laying off the ten grievors. The evidence establishes that the discharges and layoffs created considerable concern among employees that they also might be let go. Miss Jewell referred to the cook who approached her and told Miss Jewell that she could have anything she wanted so long as she did not get fired. Concerns of employees for their job security would likely have been heightened by Mr. Holmes' comments at the staff meeting of November 13th. During the meeting Mr. Holmes never mentioned the word union, but in our view, many employees would have taken his statement about closing the schools over the "atmosphere" to be a less than veiled threat to close the schools due to the presence of the trade union. In light of all of these facts, we are satisfied that the respondent's unlawful activities would likely affect the ability of employees to vote in a representation vote in accordance with their own free wishes. Accordingly, the Board is satisfied that the true wishes of the employees in the bargaining unit are not now likely to be ascertained by a representation vote.

79. The final condition which must exist before the Board may certify a trade union pursuant to section 7a is that the union have support adequate for collective bargaining. The union submitted evidence of membership on behalf of approximately fifty per cent of the employees in the bargaining unit. As already indicated, three employees who had signed union cards subsequently signed a petition in opposition to the union, although one did so only out of fear for her job. Even if we were to accept that the other two employees no longer support the union, nevertheless, based on the degree of support for the union indicated by the documentary evidence of membership before us, we are satisfied that the trade union has membership support adequate for collective bargaining.

80. In that preconditions exist for the Board to certify the trade union pursuant to section 7a, a certificate will issue to the applicant union.

81. In the circumstances of this case the respondent is directed to post a copy of the attached notice marked "Appendix", after being duly signed by the respondent's representative, in a conspicuous place in each of its three schools where it is likely to come to the attention of the employees, and to keep the notices posted for sixty consecutive working days. Reasonable steps shall be taken by the respondent to insure that the said notices are not altered, defaced or covered by any other material. Reasonable physical access to the premises shall be given by the respondent to a representative of the union so that the union can satisfy itself that this posting requirement is being complied with.

Appendix

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

We have posted this notice in compliance with an Order of the Ontario Labour Relations Board issued after a hearing in which we, the Union and a group of objecting employees all participated. The Ontario Labour Relations Board found that we violated The Labour Relations Act by discharging and laying off a number of employees because they engaged in union activities.

The Act gives all employees these rights:

- To organize themselves;
- To form, join and participate in the lawful activities of a trade union;
- To act together for collective bargaining;
- To refuse to do any and all of these things.

We assure all of our employees that:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT discharge or lay off employees because they have selected the Canadian Union of Public Employees as their exclusive bargaining representative.

WE WILL offer to reinstate the following persons: Elizabeth Prietz, Debra Janisse, Mary Weaver, Betty Pernasilici, Elaine Ryan, Joan Ball, Nicole Morin, and Lu Anne Raymond. We shall pay these eight employees, as well as Joyce Miller and Mary Sue Penny, for any earnings they lost as a result of our discrimination against them, plus interest.

WE WILL bargain with the Canadian Union of Public Employees as the duly certified collective bargaining representative of our employees in the bargaining unit described below, and if an understanding is reached we will sign a collective agreement with the union.

The bargaining unit is:

all employees of ABC Day Nursery and Kindergarten Limited in Windsor, Ontario, save and except secretary to the director, supervisors and persons above the rank of supervisor.

ABC DAY NURSERY AND KINDERGARTEN LIMITED

Dated:

Per: (Authorized Representative)

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

2214-79-R The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 494, 1007, 1410, 1425, 1592, 1669, 1916 and 2309, United Brotherhood of Carpenters and Joiners of America, Applicant, v. **Ascot Millwrighting**, Respondent, v. Association of Millwrighting Contractors of Ontario, Intervener.

Certification – Trade Union Status – Council of trade unions seeking certification – Council proving status

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *H. Caley and Ted Ryan for the applicant, no one appearing for the respondent; R. A. Werry for the intervener.*

DECISION OF THE BOARD; April 3, 1980

1. This is an application for certification in the construction industry and in respect of which the Registrar has advised the applicant that it would have to be prepared at a hearing of the Board to establish its status as a council of trade unions under section 1(1)(g) of *The Labour Relations Act*. The applicant was also advised that three of the locals which it claimed to represent would have to be prepared also to prove their status as a trade union within the meaning of section 1(1)(n) of the Act. A hearing of the Board was held for these purposes.

2. The Act defines a council of trade unions and a trade union in the following terms:

“1.-(1) In this Act,

(g) “council of trade unions” includes an allied council, a trades council, a joint board and any other association of trade unions;

(n) “trade union” means an organization of employees formed for purposes that include the regulation of relations between employees and employers and includes a provincial, national, or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.” Section 9 of the Act deals as follows with the certification of a council of trade unions:

“(1) Sections 5 to 12 and 106 and 108 apply *mutatis mutandis* to an application for certification by a council of trade unions, but, before the Board certifies such a council as bargaining agent for the employees of an employer in a bargaining unit, the Board shall satisfy itself that each of the trade unions that is a constituent union of the council has vested appropriate authority in the council to enable it to discharge the responsibilities of a bargaining agent.

(2) Where the Board is of opinion that appropriate authority has not been vested in the applicant, the Board may postpone disposition of the application to enable the constituent unions to vest such additional or other authority as the Board considers necessary.

(3) For the purposes of sections 7 and 8, a person who is a member of any constituent trade union of a council shall be deemed by the Board to be a member of the council."

3. The charters granted by the United Brotherhood of Carpenters and Joiners of America to its Locals 1007, 1425 and 1916 were submitted to the Board for examination and minutes of the individual meetings of the three locals at which the charters were installed were entered into exhibit. Having regard for the fact that the United Brotherhood is a trade union within the meaning of section 1(1)(n) of the Act and for the evidence before the Board, the Board is satisfied that Locals 1007, 1425 and 1916 are also trade unions within the meaning of section 1(1)(n) of the Act. In February 1970, all of the locals for which the council claims to act, except Local 1007, commenced action to form the Millwright District Council of Ontario. These locals were bound at the time to a collective agreement with the intervener. To this end, special meetings were held of each local at which the membership voted to form the council and approved draft by-laws for the council. Application for charter was made to the United Brotherhood by letter dated March 29th, 1974. The charter was issued under date of November 30th, 1974 and installed at the council's first annual general meeting held on that date and continuing on December 1st, 1974. At the same meeting, the by-laws of the council were ratified and officers were elected pursuant to them. The ratified by-laws were submitted to the United Brotherhood and received its approval on January 13, 1975. Subsequent to the first annual general meeting, each of the founding locals of the council assigned their bargaining rights to it. The Council's by-laws empower it to obtain bargaining rights whether by voluntary recognition or certification, to bargain for and on behalf of its affiliated locals in respect of wages, working conditions and all other matters pertaining to the regulation of relations with employers and to conclude collective agreements.

4. Local 1007 was formed when the millwrighting members of Local 38 voted at a special meeting to form a separate local of the United Brotherhood which would be affiliated with the council. The United Brotherhood issued a charter to Local 1007 under date of November 29th, 1976 and this charter was installed at a membership meeting of the local held February 17th, 1977. At the same meeting, the local was installed as a member of the council. Subsequently, Local 1007 assigned its bargaining rights to the council.

5. Since the Board has found Locals 1007, 1425 and 1916 to be trade unions within section 1(1)(n) of the Act, since the other constituent trade unions of the applicant have been found in prior proceedings of the Board to be trade unions within the meaning of the Act and, therefore, pursuant to section 94 are trade unions within the meaning of the Act, the Board finds that all of the locals which the applicant claims to represent are trade unions within the meaning of section 1(1)(n) of the Act.

6. Having regard to the charter issued by the United Brotherhood and to the evidence of the events leading thereto, the Board is satisfied that the applicant is a council of trade unions within the meaning of section 1(1)(g) of the Act. Furthermore, having regard to:

- (a) the evidence that the constituent trade unions of the council have assigned their bargaining rights to it; and
- (b) the authority vested in the council by its by-laws to obtain bargaining rights, to bargain for and on behalf of its affiliates in respect of wages, working conditions and all other matters pertaining to the regulation of relations with employers and to conclude collective agreements,

the Board is satisfied that each of the constituent trade unions has vested appropriate authority in the council to enable it to discharge its responsibilities as a bargaining agent on their behalf, all as stipulated by section 9 of the Act.

7. The Board finds that this is an application for certification within the meaning of section 108 of *The Labour Relations Act*.

10. A certificate will issue to the applicant.

1153-79-R Hotels, Clubs, Restaurants & Tavern Employees' Union, Local 261, Applicant, v. 423131 Ontario Inc and 423132 Ontario Inc. carrying on business under the Registered Firm Name and Style of **Calmil Enterprises**, Respondent.

Sale of a Business – Lessor giving up premises – Landlord leasing premises to new tenant – Virtually identical business carried on – Whether a sale of a business.

BEFORE: R.O. MacDowell, Vice-Chairman and Board Members C.G. Bourne and W.F. Rutherford.

APPEARANCES: *Eleanor S. Dunn and Frank Grella for the applicant; John G. Dunlap, Q.C. and Michael Dunlap for the respondent.*

DECISION OF R. O. MACDOWELL, VICE-CHAIRMAN AND BOARD MEMBER C.G. BOURNE; April 16, 1980

PART I

1. The name "CALMIL ENTERPRISES carrying on business as the Cafe de la Place" appearing in the style of cause of this application as the name of the respondent is amended to read: "423131 ONTARIO INC. and 423132 ONTARIO INC. carrying on business under the Registered Firm Name and Style of CALMIL ENTERPRISES."

2. This is an application under section 55 of *The Labour Relations Act* involving a restaurant business, formerly conducted by Skyline Hotels Ltd., in a commercial complex in the City of Ottawa, known as the Place de Ville. The applicant union contends that there has been a "transfer of a business", within the meaning of section 55, from Skyline Hotels Ltd.

("Skyline") to the respondent, Calmil Enterprises, and that Calmil remains bound by the collective agreement previously in force between the union and Skyline.

3. In 1968 Skyline entered into a lease with the Campeau Corporation (the owner of Place de Ville) for the premises in which Skyline subsequently ran its restaurant business. This business had three aspects: the Cafe de la Paix, Cafe de la Paix Takeout and Le Snack. When Skyline took over the demised premises there were already installed some \$75,000.00 worth of restaurant trade fixtures. Mr. G. Falsetto, the regional manager of commercial properties for Campeau, testified that these fixtures would comprise approximately 35-40% of the total assets needed by the lessee to carry on a restaurant business; and that they had been installed by Campeau as a "sweetener", or "inducement", to Skyline to enter into the lease. The remainder of the assets needed to carry on business, the managerial expertise and the employees, were supplied by Skyline itself.

4. The lease provided that the rent for the premises would be calculated with reference to Skyline's gross sales. In addition, there were a number of restrictions on the use which could be made of the premises, and the manner in which business could be conducted. These restrictions ensured that Skyline's restaurant operation would conform to the developer's concept of "balanced" commercial activity, and would not interfere with the business activities of other tenants. Such restrictive covenants are common in leases of this kind.

5. In 1978, or early 1979, a dispute arose between Campeau and Skyline concerning the alleged breach, by Campeau, of a material covenant of the lease. This dispute resulted in an action in the Supreme Court of Ontario and, ultimately, in the surrender of the lease. As part of the resolution of the litigation, certain sums were paid to Skyline, Campeau re-acquired possession of the demised premises, (including the existing trade fixtures) and Campeau acquired virtually all of the other business assets formerly used by Skyline. Campeau apparently believed that it could minimize its losses if it maintained the existing configuration of assets intact, and relet the premises to a new lessee to whom it might also be able to sell the associated assets *en bloc*. Skyline removed from the premises only those items bearing its crest or logo. Campeau was effectively left in possession of the rest of the assets required to carry on a restaurant business.

6. In mid-May, 1979 Skyline notified the union that the relationship with Campeau Corporation and the restaurant business at the Place de Ville location would soon be terminated. On June 8th, 1979 Skyline notified the union that it would be surrendering its lease, effective June 30th, 1979. On June 30th, 1979 Skyline terminated the Cafe de la Paix, Le Snack and Cafe de la Paix Takeout operations. Meanwhile, Campeau was seeking a new tenant. After Skyline's departure signs were posted on the premises indicating that they were for rent, and Campeau continued to advertise in the local newspapers, and pursue negotiations with various prospective tenants. Campeau made no effort, at any time, to establish itself in the restaurant business.

7. Basilio Caloia, one of the principals of the respondent, has been in the restaurant business for some twenty years and, prior to these transactions, was the proprietor of another restaurant in the Ottawa area. Mr. Caloia had been seeking other restaurant premises for some time and, through a real estate agent, and a brother-in-law who had been employed by Skyline, became aware that the Place de Ville location might be available for rent. There were lengthy negotiations between Mr. Caloia and Mr. Falsetto. Mr. Caloia was only

one of the individuals interested in leasing the premises and he was initially concerned that the leasing arrangement would prove too costly. Eventually, however, as part of a single transaction, having two separate and distinct aspects, Caloia entered into a lease for the subject premises and, for the sum of \$70,000.00, purchased from Campeau the assets which Campeau itself had previously acquired from Skyline. The agreement to lease was executed July 23rd, 1979. The lease itself, and the assets transfer, were consummated on August 20th, 1979. As a result of these two transactions the respondent acquired the premises and virtually all of the tangible assets formerly used by Skyline in its restaurant business. While it is difficult to assess the value of these assets, (i.e., the moveable assets left by Skyline and the restaurant trade fixtures already in place) it would appear that about 90% of Calmil's assets were formerly used by Skyline.

8. The terms of the Calmil lease arrangement are somewhat different from those which Skyline had; however the rent, payable under the new lease, is also calculated with reference to gross sales, and there are similar restrictions respecting the use of the premises and the manner in which business must be conducted.

9. The new restaurant opened on August 20th, 1979 under the name of Cafe de la Place. It remains basically a cafeteria and take-out operation. No effort has been made to maintain any link or identification with Skyline. Certain cosmetic renovations were done, the decorations have been altered and efforts were made to solicit the patronage of employees in the building, but the essential character of the operation has not changed from when Skyline was involved. None of the Skyline employees were retained. A number of them, exercising their seniority rights under the Skyline collective agreement, have transferred into job vacancies available in other Skyline operations. The rest were laid off or terminated. The present employee complement consists of new employees, certain employees formerly employed in Mr. Caloia's other restaurant operation, and certain family members of the principal owners of the restaurant.

10. The respondent dealt only with Campeau. There were no dealings, or communications, with Skyline, directly or indirectly. There was no purchase from Skyline of goods, nor an assignment of business licences, nor any express transfer of goodwill. The respondent regarded the "deal" offered by Campeau as an attractive business opportunity. It did not consider itself to be purchasing all, or part, of Skyline's "business." It was simply entering into a lease and purchasing certain assets from its new landlord. To the extent that it was able to do so, Skyline withdrew the remaining elements of its organization (i.e., expertise, management and their skills, employees, etc.) and incorporated those elements into other parts of the Skyline operation in the Ottawa area or elsewhere. Skyline considered the surrender of the lease and the transfer of assets to Campeau as a successful resolution of its civil action against Campeau. Neither Skyline nor Campeau considered this transaction with Campeau as a "sale of a business." Campeau never sought to carry on a restaurant business and, since there were no dealings between Skyline and the respondent, neither party had occasion to consider whether there had been a transfer of a business between them.

PART II

11. The relevant parts of section 55 of *The Labour Relations Act* are as follows:

"(1) In this section,

- (a) 'business' includes a part or parts thereof;
 - (b) 'sells' includes leases, transfers and any other manner of disposition, and 'sold' and 'sale' have corresponding meanings.
- (2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.
- (3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 or 45, as the case requires."

12. When a business (or a part thereof) is transferred or disposed of, the transferee acquires the business subject to the collective bargaining obligations of the transferor. Section 55 transforms these collective bargaining obligations into a form of "vested interest" which becomes rooted in the business entity and, like a charge on property, "runs with the business." The statute eliminates the labour relations effects of a change of ownership or employer; and effectively abrogates the notion of privity of contract. The purpose of section 55 has been succinctly summarized by the Board in *Marvel Jewelry*, [1975] OLRB Rep. Sept. 733 at page 735:

"Section 55 recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act, or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership."

13. Section 55 involves two related questions: has there been a sale or transfer of "something" from the predecessor to the successor; and, if there has been, is it all, or part, of a "business" which has been transferred. The first question seldom poses any serious diffi-

culties. The Act contains an extended definition of the term “sale”, and the Board has consistently held that the “manner of disposition”, or its legal form, are irrelevant, so long as a disposition has, in fact, taken place. More serious analytical problems arise with respect to the second question. There is no statutory definition for the term “business.” The Board has been left with the responsibility of fashioning an appropriate definition in particular cases, having regard to the business context, “the mischief” which section 55 was designed to cure, and the basic policies embodied in *The Labour Relations Act*. A general, and somewhat tentative definition, was suggested by the Board in *Raymond Côté*, [1968] OLRB Rep. Mar. 1211:

“The meaning to be attached to the word ‘business’ depends to a great extent on the facts and circumstances in each particular case. It cannot be said that any one facet of an enterprise taken by itself necessarily comprises a business. It has been expressed that a business is ‘the totality of the undertaking.’ The physical assets of buildings, tools and equipment used in a business are not necessarily the undertaking *per se* but are, along with management and operating personnel and their skills, necessary in the operations to fulfill the obligations undertaken with a hope of producing profit to assume its success. The total of these things along with certain intangibles such as goodwill constitute a business.”

14. A section 55 determination is largely a factual question. In *Raymond Côté*, *supra*, and a number of other cases, the Board has emphasized the importance of the facts; (see, for example: *Culverhouse Foods*, [1976] OLRB Rep. July 691 at 693; and also *Kenmir v. Frizzel*, [1968] 1 All E.R. 414 at 418, where a similar view was expressed by Widjery, J.) but it is impossible to abstract, from these cases, any *single* factor which is always decisive, or any *single* principle which provides an unequivocal guideline to the way in which the issue will be decided. What makes the problem especially difficult, is that the significance of any particular fact, or aspect of the transaction, may vary with the business context. This difficulty was noted by the Board in *Magnus Engineering and Construction Ltd.*, (Board Files 0486-79-R and 0491-79-R; decision released March 13, 1980 – as yet unreported.) At paragraph 26 the Board commented:

“The issue of employer successorship arises out of a seemingly endless variety of factual settings, with each new case presenting some of the factors considered relevant to the resolution of prior cases while raising other materially altered, entirely omitted, or newly-added facts which arguably should affect the decision of the merits. Much of the confusion which attends successorship results from the facility with which each case can be distinguished on its facts from all former cases; but to dismiss the confusion so lightly would be to disregard the fundamental differences inherent in the various business contexts in which the successorship issue arises. Factors which may be sufficient to support a ‘sale of a business’ finding in one sector of the economy may be insufficient in another. In some industries, a particular configuration of assets – physical plant machinery and equipment – may be of paramount importance; while in others it may be patents, ‘know-how’, technological expertise or managerial skills which will be significant. Some businesses will rely heavily on the goodwill associated with a particular location, company name, product name or logo; while for other business, these factors will be

insignificant. *The Labour Relations Act* applies equally to primary resource industries, manufacturing, the retail and service sector, the construction industry and certain public services provided by municipalities and local authorities. In each of these sectors the nature of the business organization is different, yet in each case section 55 must be applied in a manner which is sensitive to both the business context and the purpose which the section is intended to accomplish.”

An examination of the cases reveals certain themes, or factual patterns which, if present in the case under consideration, will strengthen the inference of a section 55 sale; but even these are only indicia. They are not conclusive tests. Even the significance of an apparent continuity of the predecessor’s business may be diminished if the assets involved in the transfer have a discrete and limited range of uses so that the transferee’s use will necessarily be the same as that of the transferor; or, if there are countervailing factors, such as a hiatus between the “demise” of the predecessor and the “birth” of the successor, or the interposition between the two of a truly independent third part. Such factors weaken the inference of a “section 55 sale” and suggest a transfer only of assets.

15. In the present case we have the continuation in the hands of the alleged successor of virtually the entire configuration of assets formerly used by the predecessor in its business organization. Moreover, there is no real change in the character of the business. Normally this would create a strong inference of a sale of a business. The trade union urges the Board to make this determination, and contends that *anyone* who enters into a lease arrangement with Campeau for the subject premises, and at the same time acquires the assets which Campeau was seeking to dispose of, will become the successor of Skyline – even though there are no direct dealings with Skyline and there is no intention, on the part of any party, to effect a business transfer. The union submits that, so long as a restaurant business is conducted in the Place de Ville location, with the assets formerly used by Skyline, the bargaining union’s rights will continue. This argument, in essence, roots bargaining rights in “the assets” rather than “the business”; and we are unable to accept it as a general proposition. A transfer of a significant portion of the predecessor’s assets may well be a “sale of a business”; but it will not always be so.

16. In the present case the alleged successor had an established restaurant business entirely unrelated to the Skyline operation. It is Mr. Caloia who is supplying the entrepreneurial initiative, managerial skills and operating personnel to the Place de Ville venture. None of these important elements of the business are traceable to Skyline; and many were actually transferred from Caloia’s existing restaurant business. Similarly, none of the employees of Skyline were retained but were either laid off or exercised their rights, under the Skyline agreement, to transfer into other jobs in the Skyline organization. Many of the present employees were transferred from Caloia’s other restaurant. There is no evidence of any attempt to recruit or retain the employees of Skyline nor is there evidence that any of such employees sought employment with Calmil. Of course, the fact that an alleged successor has a pre-existing, similar, business does not mean that it has not acquired another one. Section 55(6) contemplates this very possibility. Nevertheless, the fact that an alleged successor already has an established business organization cannot be ignored, and makes it easier to find that there has been merely an acquisition of assets rather than a transfer of a business.

17. We do not think we can ignore the rather unique circumstances in which this particular asset transfer was accomplished. The transfer to Campeau resulted from litigation with Skyline. The acquisition by Campeau of Skyline's assets was not regarded as a transfer of a business. Campeau made no attempt to continue the restaurant as a going concern, or preserve any connection with the previous owner. The premises were closed and advertised for rent. It cannot be said that Campeau was ever in the restaurant business as a successor of Skyline, nor was it the agent of Skyline, for the purposes of disposing of Skyline's business as a going concern. In this respect the facts of this case are different from the line of "receiver" cases in which the Board has found that a transfer of a business, through the offices of a receiver, constituted a transfer to which section 55 applies (see *Hughe's Boatworks*, [1977] OLRB Rep. (Dec.) 815, *Marvel Jewelry*, *supra*, and *Field-Price Ltd.*, [1973] OLRB Rep. (Oct.) 543. See also *Toronto-Dominion Bank and Price-Waterhouse Ltd.*, [1979] OLRB Rep. (Jan.) 50, in which the Board found that the appointment of a receiver does not, in itself, constitute a transfer of a disposition of the business and that, therefore, a receiver is not a successor employer in its own right.) Although this might be characterized as a "tripartite" transaction, (i.e., a "double transfer" from Skyline to Campeau and then from Campeau to Calmil) there is no pre-existing corporate or commercial relationship between the parties involved. In weighing the evidence the Board has noted that this factor may also be important. In *Metropolitan Park Inc.*, (Board File 0523-79-U – decision released December 18, 1979), the Board commented:

In assessing the facts from which a transfer of a business may be inferred, the Board has always been especially sensitive to any pre-existing corporate, commercial or familial relationship between the predecessor and the alleged successor; or between the predecessor, the alleged successor and a third party. Transactions in these circumstances require a more careful examination of the business realities than do transfers between two previously unrelated business entities. The presence of a pre-existing relationship may suggest an artificial transaction designed to avoid bargaining obligations; or (more commonly) there may be a transaction in the nature of a business re-organization which does not alter the essential attributes of the employer-employee relationship, and which should not, having regard to the purpose of section 55, disturb the collectively bargained framework for that relationship. A business may have created a new legal vehicle to carry on all or part of its activities, or it may have redistributed those activities among its existing legal components without changing its essential character or the identity of its real principals or proprietors. The separate legal identity of the components may be superfluous from an economic view point, and there may be an *actual* transfer of business activity from one to the other, even though there is little evidence of a transfer of tangible assets, goodwill, etc. In reality, the employer's business may not be exclusively "his" to transfer, for a common principal, shareholder or corporate parent may have the effective power to extinguish an apparently independent business and transfer its economic functions to another. If both businesses are also "in the same business", (i.e., supply the same product in approximately the same way and potentially to the same market or customers) a transfer of a business may have occurred but may be very difficult to detect. In such circumstances it may be important to carefully examine the pre-existing links or lines of common control to which the alleged predecessor and successor are both subject.

Such examination is precisely what is undertaken by the Board on an application under section 1(4); but it is also relevant to section 55 applications, and it is for this reason that applicants commonly plead section 1(4) in the alternative. It would be incorrect to make this consideration a decisive “test” for successorship; but where there is a pre-existing corporate connection between the predecessor and the successor the Board has been disposed to infer a ‘transfer’ if there is the slightest evidence of such transaction. (See: *Zehrs Markets*, [1975] OLRB Rep. (Jan.) 48.) The pre-existing “nexus” between the respondents inevitably colours the Board’s view of facts. As a practical matter, it is much more difficult to sustain the contention that one has not acquired a predecessor’s business but merely founded a new, independent, but similar, business serving the same market.

Here, however, there are no pre-existing corporate or commercial relationships among the parties, and the transaction cannot be viewed as an attempt to rationalize business operations, or reorganize market shares among separately incorporated divisions of a corporate family. Nor is there any evidence to suggest that the transaction is an artificial one, designed to avoid a continuation of bargaining rights. In this respect the present case contrasts with cases such as *Gordon’s Markets*, [1978] OLRB Rep. (July) 637, and the absence of any direct disposition between Skyline and Calmil takes on added significance. Skyline had no part in selecting Calmil as the new tenant and Skyline’s departure was in no way conditioned upon Calmil’s entering into a new lease with similar terms. The two transactions were entirely unrelated. There really was no disposition between Skyline and Calmil, nor proceeds of disposition flowing to Skyline, nor any other benefit to Skyline attributable to the second transaction.

18. In our view Skyline did not transfer a “business” or “going concern” to Campeau. Skyline transferred, and Campeau acquired, certain surplus assets. Campeau, in turn, transferred those assets to Calmil, who subsequently incorporated them in its own business organization. We do not think that these two separate transactions constitute a “sale of a business” within the meaning of section 55 of the Act. The application is therefore dismissed.

DECISION OF BOARD MEMBER W.F. RUTHERFORD:

1. The facts before the Board were not in dispute and the majority decision accurately sets them out. However, I disagree with the majority with respect to the conclusions they have drawn from those facts. I would find that a sale of a business within the meaning of section 55 of the Act has taken place and that the respondent Calmil is bound by the collective agreement with the applicant.

2. I wish to briefly set out the relevant facts. Campeau is the landlord of Place de Ville, an office and shopping complex. In order to provide food facilities, it leased to Skyline Hotels the space necessary to establish a fast food outlet and snack bar. Other than the chairs, tables, china, and silverware, the equipment used in the restaurant operation was provided by Campeau. The rent paid by Skyline to Campeau was based on gross sales. Any increase in Skyline’s business at the complex meant higher rents payable to Campeau and therefore more profit for Campeau.

3. When Skyline surrendered the lease, Campeau advertised for someone to take over the premises in order to have the restaurant operations continued.

4. Mr. Caloia, along with his brother-in-law, a former Maitre d' at the Skyline premises, negotiated a lease with Campeau on terms similar to that of the Skyline lease. The brother-in-law became Mr. Caloia's partner and manager of the operation.

5. Campeau negotiated both the Skyline and Calmil leases which determined the rent payable, not just on the basis of floor space area, but which sets the rent payable to Campeau based upon the gross sales of the business.

6. Campeau, once having entered into a leasing arrangement whereby its income and profits were based upon the gross sales of the restaurant business, had a direct and immediate interest in the business. In effect, Campeau was a participant in a joint venture with its tenants and was interested in having the tenants' business continued. In my view, Campeau is the link in the transfer of the business from Skyline to Calmil.

7. The Board is required by section 55 to identify the essential elements of a business and to determine whether the sum of those elements, that is, the business, has been sold. In this case, the essential elements of the predecessor's business were the assets used by it and the leased premises. While Calmil provided new personnel and entrepreneurial initiatives, nevertheless, the elements of Skyline's business were transferred through Campeau to Calmil. The food and beverage operation run by Calmil Enterprises is the same as that run by Skyline Hotels. The equipment used by Calmil Enterprises is the same equipment that Skyline Hotels used, transferred over to Calmil through Campeau Corporation. The space used for the facilities is the same for Calmil as for Skyline.

8. For these reasons, I would find that Skyline disposed of its business and that the business flowed through Campeau to Calmil. I would therefore declare that Calmil is bound by the collective agreement with the applicant.

2050-79-R Christian Labour Association of Canada, v. Applicant, **Chatham Horticulture Society**, Respondent.

Certification – Horticulture – Whether employees of Horticultural Society excluded from Act

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J.D. Bell and O. Hodges.

APPEARANCES: *W. R. Herridge Q.C. and Henk De Zoete for the applicant; Tim Sargeant and Bill Brown for the respondent.*

DECISION OF THE BOARD; April 10, 1980

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of the *The Labour Relations Act*.

3. The respondent raised a preliminary objection going to the Board's jurisdiction to entertain the application for certification. The respondent contends that by virtue of section 2(c) of the Act, the persons in the proposed bargaining unit are not covered by the Act. Section 2(c) reads as follows:

"This Act does not apply,

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- (c) to a person, other than an employee of a municipality or a person employed in silvaculture, who is employed in horticulture by an employer whose primary business is agriculture or horticulture."

To determine whether the Board has jurisdiction to entertain the application for certification it must decide firstly, whether the primary business of the Chatham Horticulture Society is horticulture and secondly, whether the employees in the proposed bargaining unit are employed in horticulture.

4. At the outset of the hearing the parties agreed that the Chatham Horticulture Society, not the City of Chatham, was the proper respondent employer to this application. Accordingly, the clause in section 2(c) relating to municipal employees is not applicable.

5. The Chatham Horticulture Society is organized under *The Horticultural Societies Act*, R.S.O. 1970, c. 207 as amended S.O. 1971, c. 50 and S.O. 1975, c. 36. Section 9(1) of the Act sets out the objects of a society organized thereunder and reads as follows:

"The object of a society is to encourage interest and improvement in horticulture,

- (a) by holding meetings for instruction and discussion on subjects connected with the theory and practice of horticulture,
- (b) by encouraging the improvement of private and public grounds, including highways and streets, by the planting of trees, shrubs and flowers, and by otherwise promoting outdoor art, public beautification, balcony gardening, therapeutic use of horticulture, community gardens and plot gardening;
- (c) by interesting youth and others in the study of horticulture by the holding of meetings, field trips, contests and competition and by such other means as the society considers proper;
- (d) by holding exhibitions and awarding premiums for the production of vegetables, plants, flowers, fruits, trees and shrubs;
- (e) by the distribution of seeds, plants, bulbs, flowers, trees and shrubs in ways calculated to create an interest in horticulture; and
- (f) by promoting the protection of the environment with appropriate horticulture projects; and

- (g) by promoting the circulation of horticultural information through all available media including periodicals and provision of books for libraries.”

6. Jack Dekker, one of three full-time employees in the proposed bargaining unit, gave evidence as to the nature of his duties and responsibilities for the Society which vary somewhat according to the season. The first four weeks of the spring/summer are generally spent planting flowers throughout the City of Chatham in approximately 100 flower beds, 150 patio boxed and 38 planter boxes. Dekker and the other employees in the proposed bargaining unit maintain and water these flowers throughout the summer. As well they cut grass approximately three times a week, maintain trees, repair walkways in parks which have been damaged over the winter and spring, and, when necessary, prepare newly acquired properties through such means as plowing and seeding. Dekker testified that at J-C Gardens, a public park in Chatham, his duties further include picking up garbage in the garden area and maintaining an ornamental pool and fountain. Three or four years ago Dekker was involved in building two retaining walls in J-C Gardens to keep soil from eroding onto the garden pathways.

7. In the fall Dekker and the other full-time employees bring in stock plants. Through the winter they carry out a program of plant propagation in the greenhouses for which seeds are planted, seedlings transplanted, cuttings taken and root stalks reproduced. In the winter months as well they assess their seed requirements and order the necessary stock. Additionally, the Chatham Civic Centre has numerous indoor plants which are maintained continually by the bargaining unit employees during the winter months. Dekker further stated that in the winter he overhauls existing flower bed plans and drafts new plans for any newly acquired property.

8. Dekker testified as to numerous duties and projects he’s worked on over the years which do not directly involve the planting or maintaining of flowers or trees: He routinely overhauls the motors on the Society’s lawn mowers, edgers, rototillers and water pumps. Last year the Society inherited a building which Dekker and another employee spent time renovating to make a workshop and office. Two years ago he assisted in the construction of one of the Society’s greenhouses. Another time he installed an electric motor in one of the greenhouses as well as the accompanying electric tubing. Three years ago he made and painted flower boxes and tool boxes. Another year he made picnic tables for use in the parks and gardens maintained by the Society.

9. Counsel for the applicant union contends that the Board has jurisdiction to entertain the application for certification and that the employees in the bargaining unit do not fall into the section 2(c) exclusion because the primary business of the Society, as reflected in section 9 of the Horticulture Society Act, is not horticulture itself but rather to encourage interest and improvement in horticulture. He contends that the Society’s dominant interest is public relations work for horticulture rather than horticulture itself. Secondly, counsel argues that the employees in question are not employed in horticulture within the meaning of section 2(c) but rather are general maintenance workers whose duties and responsibilities go far beyond horticulture. In this regard counsel emphasized their machine maintenance and repair work, renovation activities, work with power saws making flower planters and picnic tables, construction of retaining walls, repairing of walkways, maintenance of an ornamental park pool and picking up of garbage as examples of duties which do not fall into the category of “horticulture”.

10. The meaning of "horticulture" in section 2(c) of the Labour Relations Act was considered by the Ontario Court of Appeal in *Re Cedarvale Tree Services Ltd. and Labourers' International Union of North America, Local 183* (1971), 22 D.L.R. (3d) 40, sitting on appeal from a decision of the Ontario High Court, *Regina v. Ontario Labour Relations Board, ex parte Cedarvale Tree Services Ltd.* (1970), 15 D.L.R. (3d) 413, which was itself hearing an application to set aside and quash a decision of this Board, *Cedarvale Trees Services Ltd.*, [1970] OLRB Rep. Feb. 1305.

11. In defining "horticulture" for the purposes of interpreting section 2(c) of *The Labour Relations Act* the Ontario High Court at pp. 416-418 stated as follows:

"I have little difficulty in determining that "horticulture" means gardening and that in the statute it covers every kind of garden and garden work known in Ontario. It includes, among much else, work in ornamental gardens, botanical gardens and arboreta, tree nursery work, the development and care of civilized parks and urban and suburban roadsides, the care of individual shrubs and trees, topiary work, garden designs, landscaping and garden care. But it only includes those functions in connection with gardens of some kind. These views are derived from the dictionaries, from encyclopaedias and books on gardening and from the actual gardens and garden work known in Ontario, and from another statute of the Ontario Legislature, *The Horticultural Societies Act*, R.S.O. 1960, c. 175.

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The last statute makes provisions for voluntary horticultural societies in Ontario municipalities. Section 9 makes it clear that the work of such societies relates directly to theory and practice, to "the improvement of home and public grounds by the planting of trees, shrubs and flowers", to outdoor art and public beautification, to the production and distribution of vegetables, plants, flowers, fruits, trees and shrubs. This is as good an indication of the meaning of "horticulture" and the intention of the Legislature in using it, as can be imagined short of an interpretation section."

Applying the above definition of "horticulture" to the facts before it, the High Court concluded at page 419 that the primary business of Cedarvale Trees Ltd. was horticulture because "... [i]t [stood] ready to do all that [was] required for the care of trees in gardens, parks and used in 'outdoor beautification'." The Court went on to decide that the Cedarvale employees who were employed in horticulture and spent "significant time and effort in the work" fell within the section 2(c) exception.

12. On appeal, the Ontario Court of Appeal agreed with the High Court's finding that the primary business of Cedarvale was horticulture and concluded that many, if not all, of the people who fell withing the proposed bargaining unit were employed by Cedarvale in "horticulture". In defining "horticulture" itself, the Court of Appeal noted that the word comes from two Latin words: *hortus* – garden and *cultura* – culture or cultivation. The Court concluded that, "[a]ccordingly, from ancient times the word has had a connotation involv-

ing garden or gardens and, particularly pertinent to the case before it, pointed out that ‘... the cultivation of trees has always been an integral part of gardening’.” The Court of Appeal expressed agreement with the conclusion of the High Court that,

“[t]he necessity for having activity primarily directed towards growth which attracted the majority of the [Labour Relations] Board is not a concept required for the application of the word ‘horticulture’ in our society. The word can clearly apply to pruning, topiary work, fallow periods, removal of dead trees, plants and vegetables, and to scientific inquiry.”

13. Applying the definition of “horticulture” developed in these decisions to the facts of this case, the Board cannot but conclude that the primary business of the Chatham Horticulture Society is horticulture. While the Chatham Horticulture Society may hold meetings for instruction and discussion on the theory and practice of horticulture and may spend time and money on the circulation of horticultural information and educational field trips, the Board concludes on the evidence that the primary business of the Chatham Horticulture Society is the beautification of Chatham’s public grounds by the planting and care of trees, shrubs and flowers in gardens, pots and boxes. The high priority placed on the actual beautification of public grounds through the cultivation of gardens is evident in section 9(2) of *The Horticultural Societies Act* which reads as follows:

“A society shall not expend more than one-half of its total annual receipts, other than grants or donations made for specific purposes, upon any of the projects enumerated in subsection 1, *except for the purposes of planting trees, shrubs and plants on public grounds and the promotion of outdoor art and public beautification.*” [emphasis added]

Dekker’s uncontested evidence that the main function of the Chatham Horticultural Society is the planting of flower beds in the summer and the propagation of seeds in the winter further supports the Board’s conclusion that the primary business of the Chatham Horticulture Society is horticulture.

14. Turning to the second consideration of whether the employees in the proposed bargaining unit are themselves employed in horticulture, the Board has no choice but to conclude that they are. The evidence is clear that Dekker and the other employees in the proposed bargaining unit spend the major portion of their time in the preparation, planting and maintenance of City gardens, planters, and flower boxes. To this end they prepare the soil, plant flowers and trees and maintain flowers and trees and surrounding grass areas. At the conclusion of the season the garden work continues through the propagating of plants in the greenhouses for use in the public gardens the following year. The maintenance work engaged in by the employees in question clearly occupies a secondary role and does not detract from the conclusion that the employees are engaged in horticulture. The maintenance activities in question are all directed towards horticulture. Dekker’s motor maintenance work, for example, is on machines used to prepare and maintain the gardens and grass areas, the greenhouse construction and heating installation is directed towards improving the Society’s ability to propagate and maintain plants in the greenhouses. Counsel for the applicant admitted that the employees do engage in horticulture but asked the Board to conclude that they do not fall within the section 2(c) exception because they are not solely engaged in horti-

culture. While the Board agrees that the section, being exclusionary in nature, should be strictly construed, the Board is also of the opinion that it would unreasonably stretch the plain meaning of the section to suggest that it requires that employees do nothing other than garden, plant and tree work to fall within its ambit. In this regard we note the conclusion of the High Court in *Ex parte Cedarvale Tree Services Ltd.*, upheld on appeal, that the Cedarvale employees who spent “significant time and effort in [horticulture]” [emphasis added] fell within the section 2(c) exclusion.

15. For the reasons given above, therefore, the Board concludes that it does not have jurisdiction to hear the application for certification because the employees in question fall within the exclusion set out in section 2(c) of the Act.

1928-79-R Retail, Wholesale and Department Store Union, AFL;
CIO:CLC, Applicant, v. **Foodex Inc.**, Respondent, v. Group of Employees,
Objectors.

Certification – Petition – Employer addressing employee meeting by reading excerpt from “Guide to the Labour Relations Act” relating to petitions – Petition circulated subsequent to meeting – Whether voluntary change of heart

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members D.B. Archer and F.W. Murray

APPEARANCES: *H. Buchanan for the applicant; E. Rovet and E. Wilson for the respondent; Andrea Hale and Carolann Cummins for the objectors.*

DECISION OF IAN C. A. SPRINGATE, VICE-CHAIRMAN AND BOARD MEMBER D. B. ARCHER; April 14, 1980

1. This is an application for certification.

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4. We further find that all employees of the respondent at Belleville, Ontario, save and except managers and persons above the rank of manager, constitute a unit of employees of the respondent appropriate for collective bargaining.

5. Having regard to the statutory definition of a “member” of a trade union, we are satisfied, on the basis of the evidence before us, that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on 23rd January, 1980, the terminal date fixed for this application and the date which we determine, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

6. There was filed with the Board a statement of desire in opposition to the applica-

tion signed by twenty employees in the bargaining unit. The statement of desire bears the signatures of ten employees who had signed membership cards and paid \$1.00 in respect of membership fees and were, therefore, “members” of the union within the meaning of section 1(1)(j) of the Act. These “members” had had a purported change of heart and now allegedly no longer wished to support the applicant.

7. The Board has a long established practice of accepting statements of desire such as the one now before it and, on the basis of the statement, exercising its discretion under section 7(2) to order a representation vote provided, however, that the statement is both clearly voluntary and also contains the signatures of a sufficient number of persons who had previously signed membership cards such that there exists a real doubt as to whether the union’s members continue to support its certification.

8. Before it will exercise its discretion and direct the taking of a representation vote on the basis of a statement of desire, the Board seeks assurances that the purported change of heart on the part of those employees who previously supported the union was clearly voluntary and not the result of either improper employer influence or a concern that a refusal to sign the statement would be made known to the employer. The Board’s concerns in this regard were set out as follows in the *Radio Shack* case, [1979] OLRB Rep. Nov. 1043:

“The Board has long held that there is an onus on a party relying on a statement of desire in opposition to an application for certification to establish that the “sudden change of heart” by those who have signed for the union, represents a voluntary change of heart. The Board recognizes the delicate and responsive nature of the employer-employee relationship and having regard to it, is circumspect in its assessment of the voluntariness of any statement of desire which bears the signatures of employees who have also signed cards in support of the union. The Board’s approach to these matters is described in the leading *Pigott Motors* case, 63 CLLC ¶ 16,264 in the following terms:

‘In view of the responsive nature of his relationship with his employer and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason and because the Board has discovered in a not inconsiderable number of cases that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence of a form and of a nature which will provide some reasonable assurance that a document such as a petition signed by employees purporting to express opposition to the certification of a trade union, truly and accurately reflects the voluntary wishes of the signatories.’

Having regard to the sensitive nature of the employer-employee relationship, the Board has consistently held that it must be governed by the overall environment in the work place in deciding whether or not the statement of desire represents a voluntary expression of those who signed it. If the evi-

dence establishes that the hand of management has been actively involved in its origination, preparation or circulation, the Board will dismiss the statement. The Board will also, however, dismiss the statement if the evidence establishes that an employee might reasonably suspect the involvement of management and hence be concerned as to whether or not management might become aware of his decision to sign it or not to sign it. (See *Morgan Adhesives of Canada Ltd.*, [1975] OLRB Rep. Nov. 813 and the cases cited therein.)”

9. Ms. Carolann Cummins was the only person to testify concerning the origination and circulation of the statement of desire. As is the case with the majority of bargaining unit employees, Ms. Cummins is a student who works for the respondent on a part-time basis. According to Ms. Cummins she both drafted the statement and also approached other employees to get them to sign it.

10. Ms. Cummins testified that she prepared the statement of desire on January 21, 1980. In cross-examination, she indicated that on the evening of the same day management called a meeting of the employees. At this meeting Mr. Torrance, identified as the respondent's vice-president, read to the assembled staff portions of “A Guide to The Ontario Labour Relations Act” which is published by the Ontario Ministry of Labour and available to the public on request. There was also left lying out at the meeting at least one copy of the two pages from the same publication dealing with the filing of statements of desire in opposition to an application for certification. At the bottom of the material had been typed a note indicating that it came from the Guide to the Act. Ms. Cummins did not bring this material to the meeting. At the hearing no representative of the respondent came forward to explain why management had called the meeting or what management's knowledge was concerning how the material on statements of desire came to be at the meeting. In these circumstances we are led to infer that management itself brought the copied pages from the Guide to the meeting and that the same pages were among those parts of the Guide which were read to the employees by Mr. Torrance. All of the employees who signed the petition apparently did so after the meeting with management.

11. During her cross-examination Ms. Cummins referred to another meeting of employees with management held on January 31, 1980. According to Ms. Cummins management had earlier arranged for a bus to transport all of the employees to the Board hearing but that at the January 31st meeting it was announced that the bus was being cancelled.

12. In our view management's action in calling employees together on January 21st, and in referring to, and making available, portions of the Guide relating to statements of desire, could only have been prompted by a desire to make known to the employees management's wish that such a document be circulated, and also to influence employees into signing it. Employees already had available to them the same information as was provided by management at the meeting. Not only could they on their own initiative have obtained copies of the Guide, but only three days prior to management calling the meeting, the respondent, on directions from the Board, had posted a Form 5 “Notice to Employees of Application for Certification and of Hearing.” The notice set out a number of matters relevant to the application for certification including the following information regarding employee statements of desire in opposition to the application:

“4. any employee or group of employees affected by the application and desiring to make representations to the Board in opposition to this application must send to the Board a statement in writing of such desire, which shall,

- (a) contain the return mailing address of the employee or representative of a group of employees;
- (b) contain the name of the employer concerned; and
- (c) be signed by the employee or each member of a group of employees.

5. The statement of desire must be,

- (a) received by the Board not later than the terminal date shown in paragraph 3; or
- (b) if it is mailed by registered mail addressed to the Board at its office, 400 University Avenue, Toronto 2, Ontario, mailed not later than the terminal date shown in paragraph 3.

6. A statement of desire that does not comply with paragraphs 4 and 5 will not be accepted by the Board.

7. Any employee, or group of employees, who has informed the Board in writing of his or their desire in accordance with paragraphs 4 and 5 may attend and be heard at the hearing in person or by a representative. Any employee or representative who appears at the hearing will be required to testify, or produce a witness or witnesses who will be able to testify from his or their personal knowledge and observation, as to (a) the circumstances concerning the origination of the material filed, and (b) the manner in which each of the signatures was obtained.”

13. As previously noted, we are satisfied that management’s action in assembling the employees together, and then referring to, and providing them with, material on statements of desire could only have been done to make known to employees management’s desire that such a statement be circulated and also to influence employees into signing it. We are also satisfied that by its conduct management became associated with the process of employee opposition to the trade union and because of this there was likely established in the minds of the employees a link between management and the statement of desire. This, in turn, raises a real possibility that when employees who had previously signed union membership cards signed the statement of desire they were motivated by a concern that any failure to sign the document might be made known to management.

14. Having regard to these considerations, we are not satisfied that when the ten employees who had previously become members of the union signed the statement of desire they were expressing a genuine and voluntary change of heart free from either managerial influence or concerns that management might become aware of any refusal on their part to

sign the document. Accordingly, we are not prepared to exercise our discretion to direct the taking of a representation vote.

15. A certificate will issue to the applicant.
16. The decision of Board Member F. W. Murray will be forthcoming at a later date.

1918-79-U R.W. Kuszelewski, Complainant, v. Consolidated Fastfrate Limited, Respondent, v. Teamsters Union, Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Intervener.

Discipline – Interference in the Trade Union – Distribution of literature relating to internal union matters – Whether employee has absolute right to distribute material on company premises – Whether company may restrict distribution

BEFORE: R.O. MacDowell, Vice-Chairman and Board Members J.A. Ronson and W.F. Rutherford.

APPEARANCES: *R.W. Kuszelewski for the complainant; Stanley George Lowe and Brian Singleton for the respondent; Val Neal for the intervener.*

DECISION OF THE BOARD; April 24, 1980

I

1. This is an application, under section 79 of *The Labour Relations Act*, alleging a breach of section 58(c) of the Act. Section 58(c) provides as follows:

“No employer, employers’ organization or person acting on behalf of an employer or an employers’ organization,

(c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.”

The complainant, Ray Kuszelewski, alleges that he has been dealt with contrary to section 58(c) by Stanley George Lowe, branch manager of Consolidated Fastfrate Limited. In accordance with section 93 of *The Labour Relations Act*, the Board hereby directs that Consolidated Fastfrate Limited be substituted as the party respondent in this proceeding.

2. The respondent employer is a freight forwarding company with business locations in and around the Municipality of Metropolitan Toronto. The complainant is a truck driver,

who has been employed by the respondent for approximately four years. The employees of the respondent, including the complainant, are represented by Local 938 of the Teamsters Union. The respondent and Teamsters Local Union 938 are currently bound by a collective agreement, Article 17 of which provides as follows:

“BULLETIN BOARDS

The company agrees to permit posting of any notices of union meetings or functions on a bulletin board conspicuously placed and provided for that purpose provided they are authorized and signed by an officer of the local union.”

3. The complainant is one of a group of union members who are dissatisfied with the way in which the affairs of Local 938 are being conducted. This group of “rank and file” members calls itself “Teamsters for Teamsters”, and has a loose affiliation with a similar organization in the United States, known as “Teamsters for a Democratic Union” (TDU). Each of these organizations has its own symbol, or logo. The complainant explained that the purpose of both organizations was to encourage discussion, debate, and “reform” within the union.

4. The rank and file organization, within Local 938, dates from the last election of local officers when a coalition of members promoted a slate of candidates in opposition to the existing elected officers. After the election, this group remained in existence as an organized faction within the local. The complainant testified that the organization was not itself a trade union, nor was it seeking to form a trade union, or persuade the respondent’s employees to give up their membership in Teamsters Local 938. The sole purpose of the “rank and file” organization was to encourage employees to take a more active role in the on-going affairs of Local 938.

5. For the last two or three years leaflets from the dissident faction have been surreptitiously distributed on the respondent’s premises, without its knowledge or consent. This material is highly critical of the union and its elected officers, who are consistently referred to in disparaging and derogatory terms. Nor are these barbs reserved solely for the union officers. The respondent and its officers have also been mentioned in the same pejorative manner, and it is not difficult to understand their concern about the name calling, inaccuracies, half-truths and innuendo. Prior to January of 1979 no action was taken by the company to discourage the distribution of literature or to penalize any employee who was involved.

6. On January 25, 1979 a number of TDU stickers were applied to the walls of the washrooms, lunchroom, hallways and other areas of the respondent’s premises. These stickers were of the self adhesive, permanent, type which required considerable effort by the cleaning staff to remove. On the same day the complainant was disciplined for applying a TDU sticker to the dashboard of the truck which he was driving. Because of the “sticker” incident, and the continuing annoyance caused by the printed material, the respondent posted the following notice:

“The posting or circulation of any type of publications, literature, or signs, stickers, etc. on Consolidated Fastfrate property is not allowed, without authorization to do so, from either Brian Singleton or Stan Lowe.

Anyone found failing to comply will leave us no alternative but to take severe disciplinary action against that person. Please govern yourself accordingly.”

This notice appeared on June 22, 1979 over the signature of Stanley Lowe.

7. On June 25, 1979 the complainant was seen distributing literature on company premises, and company time. When reminded of the notice posted just three days before, the complainant indicated that he had read it, but that it was “illegal”, and could not apply to him. Subsequently, on or about November 22nd, 1979, the complainant was again observed handing out literature on company premises – in this case immediately prior to his starting time. The pamphlets were being handed out to individuals going in to work. Both incidents resulted in the issuance of a written warning. There is no doubt that the complainant was aware of his employer’s views respecting the distribution of literature, but chose to ignore them.

8. It is admitted that none of the material distributed by the complainant either emanated from, or was authorized by, Teamsters Local 938 so as to fall within the ambit of Article 17 of the collective agreement. It is also admitted that the circulation of leaflets and newsletters emanating from Teamsters Local 938 is freely permitted, in accordance with Article 17 and, further, that the distribution of certain trade magazines is also permitted. The employer reserves the right to scrutinize these publications prior to their distribution, but has had no occasion to interfere.

9. The employer in the present case has not sought to stifle internal union political activity. At the time of the last local union election, promotional material was circulated, and the candidates from the opposing factions apparently addressed the employees without interference. The employer has not even specifically refused to permit the circulation of material emanating from the dissident employees. None of this material was ever presented to the respondent for its consideration. It was simply distributed without regard to the company’s June 22nd notice. Except for the derogatory comments, to which we have already referred, none of this material related to the respondent’s collective bargaining or employer-employee relationships. The material was largely of a “political” character, related to internal union affairs, and we accept the uncontradicted evidence of the employer that its distribution, on the premises, was a disruptive influence, which interfered with the employees’ performance of their duties.

10. The complainant contends that section 58(c) of *The Labour Relations Act* protects his right to distribute “union-related” literature and prohibits any employer interference. The complainant argues that his pamphlets and activities are being “discriminated against” and that this discrimination constitutes a breach of the statute.

II

11. The issue raised by the complainant is an important one touching, as it does, the ability of individual members to influence the policy and decision-making processes within their union. The importance of these issues cannot be ignored in a society which values democratic methods of decision making; nor is there any doubt that, *ceteris paribus*, democratic organizations which encourage debate, and tolerate dissent, are preferable to those which

do not. The issue before the Board, however, is a much narrower one, which involves not only the relationship of the individual to his union but also the right of the employer to minimize the adverse impact which factionalism and internal union dissent may have on the conduct of his business.

12. It must be recognized, at the outset, that in contrast to the right of self organization, the “rights” which the complainant asserts are not clearly evident on the face of the statute. Section 3, upon which the complainant primarily relies, refers to the activities of a “trade union” and it is admitted that the dissident group is neither a trade union nor seeking to form a trade union. Of course, the Act does recognize the political character of trade union organizations. The existence of internal union dissent is contemplated by section 38(2) of the Act, section 63 regulates the conduct of strike and ratification votes; section 73 preserves a measure of local union autonomy; and sections 75 to 77 facilitate a member’s access to certain information about his union. However, the Act is generally silent about internal union affairs, and no where are employees explicitly given the right to engage in union politics on company premises or company time. Indeed, even the right to self organization – which is specifically guaranteed, and protected, by the Act – is not unfettered or absolute. The statute recognizes that the employer has a legitimate interest in maintaining an efficient production process; and that this interest might be sacrificed if the organization of his employees (with its associated discussion, debate and general turmoil) could occur, as of right, at a time when the employees were expected to perform their ordinary duties and responsibilities. Section 62 of the Act provides as follows:

“Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade him during his working hours to become or refrain from becoming or continuing to be a member of a trade union.”

13. The right to engage in trade union activity, and the right to pursue business efficiency, are both recognized parts of the statutory scheme. Neither right is unlimited, and accommodation between the two must be obtained, with as little destruction of the one as is consistent with the maintenance of the other. It follows, we believe, that the formulation of general rules in this area must be undertaken with some caution for differing fact situations may call for differing accommodations.

14. On an unfair labour practice complaint the Board is required to consider the employer’s motivation, and determine whether the impugned conduct was undertaken, *bona fide*, in furtherance of legitimate employer interests; or, alternatively, was designed, in whole or in part, to undermine his employees’ statutory rights. Assuming, without finding, that the right to engage in trade union politics is a form of union activity protected by the statute, it is still necessary to make this determination.

15. In assessing an allegedly illegal restriction on trade union activity, the Board begins with the premise that “working time is for work”, and that time outside of working hours is an employee’s time, to use as he wishes, without unreasonable restraint, even though he may be on company property. However, a number of other factors may be relevant. Is the restraint on employee solicitation an absolute prohibition, or merely a restriction on the times and places when the activity can occur? In particular, does the restriction, as framed or administered, apply to both working time and non-working time, or extend to

such non-working areas of the enterprise as employee cafeterias or lunch-rooms? Does the activity in non-working areas, nevertheless, “spill over” into the work place, thereby justifying a broader restriction? Is promulgation of the rule closely associated with the ebb and flow of a trade union organizational activity? Is the impugned employer action part of a pattern of conduct hostile to the trade union? Has solicitation for other purposes, or the distribution of other material, been permitted on working time, and has the no-solicitation rule been applied in a discriminatory fashion? Is the content, or message, of the literature sought to be distributed sufficiently connected to the exercise of rights, or the promotion of objectives, guaranteed by the Act, that statutory protection for such communication can reasonably be inferred? All of these questions may be relevant in the particular circumstances of the case. The fact that the rule may have the effect of impeding employee activities is not determinative of its propriety. As the Board observed in *Associated Medicine Services Inc.*, 64 CLLC ¶16,303, at page 980:

“... The question then arises as to whether the respondent was entitled to issue a directive forbidding union organization and the dissemination of union propaganda on its premises during hours which did not constitute ‘working hours.’ For the answer to this question reference must be had in the first instance to section 3 of the Act which declares that ‘every person is free to join a trade union of his own choice and to participate in its lawful activities.’ What those lawful activities might be can be gathered in part from the Act itself. Having regard to the provisions of the Act read as a whole. I am of the opinion that organization of a trade union and collective bargaining are two of the activities which are contemplated as coming within the scope of section 3 and that freedom to participate in these activities is among the ‘rights’ dealt with by section 50 of the Act. The last-mentioned section forbids an employer to ‘refuse ... to continue to employ a person ... because the person was or is a member of a trade union or was or is exercising any other rights under [the] Act.’ *An employer discharges a person for infraction of a ‘plant rule’ which forbids an employee to exercise his rights under the Act is therefore acting in violation of section 50 of the Act. This conclusion does not mean that an employer has been deprived by the legislation of authority to maintain order on his premises and to ensure that productivity will not suffer. If the primary and bona fide purpose of any rule he establishes with regard to activity on his premises outside of working hours or of a kind not covered by section 53 is in furtherance of the objectives just mentioned or like objectives, no exception can be taken to the rule, even though an incidental effect of the rule may be to curtail the opportunity a person in his employ has to exercise his rights under the Act. A similar principle would apply in a proper case to a situation where a person is discharged in circumstances of this nature even in the absence of any announced rule. ...*” [Emphasis added]

16. We turn now to the facts at hand – again assuming, without finding, that the right which the complainant asserts is protected by the statute.

17. The respondent has had a bargaining relationship with the Teamsters union for more than ten years. There is no suggestion here that the respondent has attempted to inter-

fere with the administration of its employees' bargaining agent, or with any other trade union. There is no pattern of unfair labour practices or anti-union conduct. No attempt has been made by the employer (or by the complainant) to persuade anyone to become, or cease to be, a union member, or to support, or oppose, the displacement of Teamsters, Local 938. There is nothing inherently unreasonable, or improper, in a company rule forbidding the distribution of material without prior permission; nor is there anything improper in according to the recognized bargaining agent certain rights, and means of communication, which are not automatically extended to other groups. Such a possibility is expressly contemplated by section 38 of the Act. The company has permitted the circulation of any, and all, literature emanating from the employees' chosen bargaining agent and has even permitted a certain amount of electioneering at the time of the last local union election. Neither of these facts support an inference of anti-union animus.

18. Nothing in *The Labour Relations Act* prevents an employer from introducing rules which promote efficiency, or prevent an undue interruption of the production process, and there is no evidence to suggest that the employer in this case had any other motive. Its rule was rather broadly drafted and, *ex facie*, could apply to non-working areas; but with this exception, there is nothing in the form of the rule which supports the complainant's position; nor, since the dissident employee group has never sought the company's permission to distribute literature, can it now claim that the company has exercised its authority in an unreasonable or discriminatory fashion. It will be recalled that the decision to introduce the rule followed such activities on behalf of the dissident group as defacing company property. Finally, it is significant, in our view, that the content of the literature is virtually irrelevant to the respondent's employer/employee, or collective bargaining, relationships. Where the company is specifically mentioned, the authors had engaged in puerile name-calling. It is difficult to see what right under the Act is promoted by referring to the respondent as "Constipated Fastfrate", the manager as "Brian Simpleton", or by falsely suggesting that the company has been "fined" because of its safety record.

19. We are satisfied that the respondent has not breached section 58(c) of *The Labour Relations Act*. The application is therefore dismissed.

1850-79-R Retail Clerks Union, Local 206, Chartered by the Retail Clerks International Union, Applicant, v. Canterbury Foods Limited carrying on business as **Crock & Block Restaurant and Tavern**, Respondent, v. Group of Employees, Objectors.

Certification – Membership evidence – Allegation of non-pay sustained – Collector not union officer but principal organizer – Whether sufficient doubt cast on total membership evidence – Vote ordered

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Ted Wohl and Les Dowling for the applicant; D. K. Gray, D. Mahy and M. Moran for the respondent; Don Robinson and Brad Coulter for the objectors.*

DECISION OF THE BOARD; April 3, 1980

1. This is an application for certification.

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4. The application deals, by agreement, with both a full-time and a part-time bargaining unit. Based on the membership evidence filed, the applicant would appear to be in a certifiable position with respect to the full-time unit, and in a "vote" position with respect to the part-time unit. The applicant, however, seeks to be certified without a vote for both units pursuant to the provisions of section 7a of *The Labour Relations Act*. There was filed with the Board, in addition a statement of desire in opposition to the applicant, which, if voluntary, would normally cause the Board (apart from the 7a application) to direct a vote to be held in the full-time unit as well.

5. By letter dated January 15, 1980, however, the respondent filed with the Board an allegation that one of the persons for whom a membership card was submitted by the applicant failed to pay the \$1.00 initiation fee. The Board, therefore, as a preliminary matter, conducted its usual inquiry into this allegation of "non-pay".

6. Miss Cynthia Dicerni, the employee involved, appeared pursuant to the Board's summons and gave evidence. She is employed essentially as a waitress in the respondent's restaurant in Burlington. She performs other functions as well when required, such as bartending, cashiering, and hostessing. When performing the latter-most function, she is responsible for the general supervision of other employees on her shift, including assigning time cards, checking stations, and ensuring that work assignments are properly carried out. There are some 7 or 8 other employees who perform the same functions from time to time. Miss Dicerni has been employed by the respondent for approximately a year and a half. She acknowledged on cross-examination that her boyfriend is presently engaged in a training program as kitchen manager for the respondent, although she did not consider him at this point to be part of management. She further acknowledged that she had been involved in the origination of a "petition" against the applicant.

7. Miss Dicerni testified that on December 28, 1979 she received a telephone call from Mr. Bob Gibbon to meet him for coffee that evening. Mr. Gibbon's wife, Linda, works at the respondent's restaurant with Miss Dicerni. The three have played baseball together, and Miss Dicerni has been at the Gibbon's home in the past. Mr. Gibbon picked Miss Dicerni up and sought out a licensed restaurant. After one or two drinks, Mr. Gibbon brought up the subject of the Union. He indicated that the other employees were afraid to approach Miss Dicerni as they thought she was too close to management. He further indicated that they had enough people for the Union without her card but were still anxious to know that she was with them. Mr. Gibbon then discussed with Miss Dicerni the various reasons why he felt employees of the respondent needed a union. Mr. Gibbon began to explain the process of bringing a union in, and Miss Dicerni testified that she got the impression from Mr. Gibbon that the card was not to certify the Union, but simply to bring the matter to a vote to find out what people wanted. She acknowledged he said something about forty and fifty-five per cent. In any event, after three or four drinks, both returned to Mr. Gibbon's car in the parking lot. In the car Mr. Gibbon asked Miss Dicerni if she was interested in signing a card. She replied that she was, and he took some cards out of his briefcase. He tried to write the card up a couple of times, but had trouble with Miss Dicerni's name, so Miss Dicerni filled out the card herself and signed it in both places. She left only the amount of the initiation fee blank, along with the place for Mr. Gibbon's signature. Mr. Gibbon said, "You're supposed to pay a dollar, but don't worry about it". He then filled in the rest of the card.

8. The next morning Miss Dicerni attended a meeting with other staff members, including the manager, Mr. Chami, at the respondent's premises, and learned the significance of paying the dollar. She subsequently reported to management the transaction between herself and Mr. Gibbon. The day after her allegations were made public, Mr. Gibbon came into the restaurant while Miss Dicerni was working. According to Miss Dicerni, he accused her of "squealing" on him for not collecting the dollar and of saying that he tried to get her drunk, and also that he tried to get fresh with her in the car. Miss Dicerni indicated that he made it very uncomfortable for her to continue her work.

9. Mr. Gibbon was summoned by the Board to testify as well. He holds no office in the applicant, and is employed at a company unrelated to the respondent. Mr. Gibbon has been very active in the United Steelworkers of America for a number of years, having held positions including member of the Education Committee of District 6 and, more recently, Chairman of Local 15506 of the United Steelworkers of America. He has participated in organizing campaigns for the Steelworkers in the past. As indicated, Mr. Gibbon's wife, Linda, is an employee of the respondent. Mr. Gibbon was a regular visitor to the respondent's restaurant in Burlington, usually to pick up his wife, and it was common for him to wear his Steelworkers' jacket to the restaurant. He testified that he had been approached over a year ago to start a union at the respondent's restaurant, but that he felt at that time that the employees there did not need a union. When approached again in October or November, he thought that there was by then a need for a union, and personally set out to make the selection. After approaching two other unions, he finally settled on the applicant union. He then became actively involved in a campaign to organize the respondent's employees during the month of November, and in fact used 10 days of his vacation for that purpose. He personally, however, signed only two cards as "collector". He indicated that he and his wife kept their organizing material in a single briefcase, and that Mr. Dowling of the Retail Clerks Union picked up any cards and money collected either at their house or at the frequent meetings among the three. Mr. Gibbon testified he felt that he, as a non-employee of the re-

spondent, should be the one to approach Miss Dicerni to sign a union card, as he was afraid she might report such an approach to management. On the evening in question, he spent a good deal of time explaining to Miss Dicerni the benefits of having a trade union, and the manner in which a trade union becomes certified. He indicated that while a representation vote was discussed as a possibility, there was no way that Miss Dicerni could have gotten the impression that that was all she was signing for. He insisted that he made it clear to Miss Dicerni that they already had enough cards to be certified, but that they were going for 100%. Upon returning to his car in the parking lot, Miss Dicerni agreed to sign a card. Mr. Gibbon tried twice to spell her name properly, and then gave Miss Dicerni a card to fill out herself. Mr. Gibbon testified he then filled in the dollar portion and signed the receipt, which he tore off and gave to Miss Dicerni. At this point, according to Mr. Gibbon, Miss Dicerni was rummaging in her purse for the dollar, which she then handed to Mr. Gibbon. He then drove Miss Dicerni home. He indicated that the others in the organizing campaign were amazed to learn that evening that he had been successful in signing her. When asked by counsel what he did when he subsequently learned of the allegations against him by Miss Dicerni, he responded: "Nothing I just remained friends with Cyndi". He at first categorically denied saying anything at all to Miss Dicerni about the charge, or even asking her what her charges were all about. He said he was not surprised by them as he had been "dealing with companies a long time". Subsequently in his evidence, however, Mr. Gibbon indicated that he might have asked Miss Dicerni if she was going to tell the truth about the charges. He still denied any heated discussion at the time, or that he was giving Miss Dicerni a hard time. Mr. Gibbon acknowledged having heard from others the allegation that he had tried to get Miss Dicerni drunk, but testified that he could not remember walking "directly" to Cyndi and saying anything to her about it. When asked again, however, he conceded that during the conversation "over the next two months", the subject "may" have come up, "maybe in a friendly relationship, but no direct beeline to her". Mr. Gibbon was then asked if he ever said in the restaurant: "I wish we could pay Doris \$10.00 to keep her mouth shut?" Mr. Gibbon responded that it would take more than \$10.00 to have Doris keep her mouth shut, then indicated he wasn't sure who Doris was, and that he did not recall making any such statement.

10. While, as indicated, Mr. Gibbon appears as collector on only two of the cards submitted by the applicant, his wife, Linda, appears as collector on an additional ten. Mr. Gibbon testified that a number of cards were signed in the presence of both him and his wife, and that these usually were signed at the Gibbon's house. He pointed out, however, that there was little discussion about the unions on those occasions, since people coming to his house were already committed to signing a card.

11. The Form 8 filed with the Board in this application in support of the membership evidence was signed by Mr. Les Dowling, and accordingly Mr. Dowling was also summoned to testify before the Board. He advised the Board that he was an organizer with the Retail Clerks Council in Ontario at the time of this campaign, and had been so for approximately three years. His involvement with this union (and its predecessors) dates back some 26 years. He testified that he had stressed the importance of the dollar with all of the individuals involved in this organizing campaign, and reminded them from time to time at subsequent meetings. Mr. Dowling testified he really had contact with only two people on the organizing committee, Linda and Bob Gibbon. He stated that they were the "key" people in the organizing campaign with Crock & Block, and that the two of them worked "as a team". Mr. Dowling did not know the extent to which other persons were assisting the Gibbons. He

indicated the whole campaign began with the contact by Bob Gibbon. Mr. Dowling was aware that Mr. Gibbon held some office in the Steelworkers, at the plant level, but certainly not on a full-time basis.

12. The respondent called Patricia Whitfield to testify. Miss Whitfield has been a bartender at the respondent's restaurant for approximately two years. She testified that Mr. Gibbon was frequently in the restaurant, talking to other employess, and that he, his wife, and another employee named Kevin were obviously the main individuals involved in the union campaign. She testified that at one point she heard Mr. Gibbon say to Kevin: "I wish we could pay Doris ten bucks to keep her mouth shut". She did not hear the rest of the conversation, and couldn't tell whether Mr. Gibbon had made that statement solely for her benefit or not. She stated that it struck her as strange that that was the only statement which she really heard clearly.

13. The respondent also called Barbara Horth to give evidence. Miss Horth has been employed by the respondent as a hostess for approximately a year and a half. She as well confirmed that Bob Gibbon appeared to be the "strongest" among the union proponents. She testified with respect to a conversation between Mr. Gibbon and Miss Dicerni which took place in front of the bar in the restaurant during the latter part of January. She heard very little of what was said, other than the word "union", but indicated that Miss Dicerni looked surprised and upset. She stated that Mr. Gibbon raised his voice a few times, and that he was "furious about something". It should be noted that the respondent delivered notice of Miss Dicerni's "non-pay" allegation on or about January 15, 1980.

14. The applicant called Linda Gibbon as a witness. She testified that she confirmed with her husband on the evening of December 28th that he had obtained a signed card and a dollar from Miss Dicerni. The card and the dollar were left in the Gibbon's mailbox for Mr. Dowling to pick up.

15. Finally, the applicant called David Newhouser as a witness. He is a part-time employee in the respondent's restaurant. He testified that shortly before New Year's he had been having a discussion about the union with the respondent's manager, Mr. George Chami, and that Mr. Chami then called Cyndi Dicerni over and said that she would deny anything he, Mr. Chami, had said to Mr. Newhouser. According to Mr. Newhouser, Miss Dicerni nodded. Mr. Chami then left. Mr. Newhouser acknowledged that Miss Dicerni had heard none of the rest of the conversation, and that she did not say anything in response to Mr. Chami's statement to her, other than nod. Miss Dicerni's explanation of the incident was that Mr. Chami's statement had taken her by surprise, and she had nodded in the expectation of hearing what it was all about.

16. The parties were in agreement that the Board had first to decide who was telling the truth with respect to the allegation of non-pay, and, if the Board decided that it was Miss Dicerni, then the Board had to decide what effect this incident should have on the rest of the applicant's membership evidence.

17. In deciding the credibility issue, the Board must be cognizant of the fact that Miss Dicerni was admittedly an active petitioner against the applicant, as well as the timing of the disclosure to her of the importance of paying the dollar. Notwithstanding this, the Board found Miss Dicerni to be a sincere, straightforward and believable witness. In addition, Miss

Dicerni appeared to be an intelligent and careful individual, and the Board, on balance, finds the fact of her leaving blank on her receipt the amount of money which she was paying to be more consistent with no mention having been made of the dollar, than with Mr. Gibbon's version. Further, the Board finds Miss Dicerni's explanation of the Newhouser incident to be credible in the circumstances in which it occurred. Mr. Gibbon, on the other hand, was flippant and evasive in much of his testimony, and rarely volunteered anything that was not self-serving, unless asked very specifically, sometimes for the second or third time. His initial evidence with respect to his reaction to Miss Dicerni's charges, that he "just remained friends with her" and never discussed the charges, is not only difficult to accept in itself, but was contradicted by Mr. Gibbon on cross-examination, and, it would appear, by the evidence of Barbara Horth. The Board is not in a position to make any conclusive determination with respect to Mr. Gibbon's motive for failing to insist on the dollar from Miss Dicerni, other than to note that Mr. Gibbon clearly regarded it as a personal triumph to succeed in obtaining Miss Dicerni's signature on a union card.

18. The important point is that the Board, weighing all of the evidence, finds that the "non-pay" did take place. The Board must now decide the consequence which flows from that. The applicant takes the position that the Board, based on its previous decisions, need go no further than to reject those cards (being two) on which Mr. Gibbon is shown as collector. The respondent, on the other hand, argues that the circumstances of this case are such that the Board can place no reliance on the evidence of membership filed, and accordingly must dismiss the application.

19. The Board notes at the outset that it finds nothing improper or remiss in the conduct of Mr. Dowling, the Retail Clerks Council organizer. Mr. Dowling appears to have properly instructed his organizers at the outset, and to have made the necessary inquiries prior to subscribing his name to the Form 8 declaration. On the other hand, there can be no doubt from the evidence of Mr. Dowling and other witnesses that the campaign was "run" by the Gibbons. It is clear that Mr. Gibbon was not inexperienced in these matters, and indeed it was he who did the initial shopping to select the appropriate union. From then on, as Mr. Dowling indicated, he and his wife worked as a team. Mr. Dowling had no direct contact with any other employee organizer; all membership evidence was funnelled through the Gibbons. As to the extent of Mr. Gibbon's improper conduct, the Board finds, having regard in particular to Miss Dicerni's acknowledgement that the percentages forty and fifty-five per cent (as she recalled it) were in fact discussed, that whatever Miss Dicerni's understanding of the conversation was, there was no active misrepresentation on the part of Mr. Gibbon. The only misconduct before the Board, therefore, is the single instance of non-pay. The Board is concerned, however, about the obviously dominant role which Mr. Gibbon played in the entire campaign.

20. The Board's basic policy with regard to irregularities in membership evidence has been set out in the *Webster Air Equipment Co. Ltd.* case, 58 CLLC ¶18,110 in particular in the following passage:

"It is obviously a practical impossibility for the Board to interview each employee on whose behalf documentary evidence of membership is filed in a certification proceeding, in order to ascertain whether he has personally signed the application for membership and whether he has paid on his own behalf the dues or fees which the receipt accompanying

the application purports to acknowledge. . . . In the normal course, the Board accepts such representations at their face value. However, since the Board is compelled to rely to such an extent on evidence which, by the very nature of things, is not subject to examination by the parties to the proceedings (see section 72(1) of *The Labour Relations Act*), it must be very circumspect in accepting it and it must insist on the highest standards of integrity on the part of those who submit such evidence. Any attempt to mislead the Board or any failure to make full disclosure of all material facts must weigh heavily against an applicant. In dealing with this situation, the Board has made a distinction between two types of cases: (i) where the action impugned is that of a responsible officer or official of a union, and (ii) where the action is that of a supporter or canvasser on behalf of an applicant who occupies an inferior office or no office in the union. In so far as the first of these is concerned, the Board said in the *RCA Victor Company* case, (1953) CCH Canadian Labour Law Reporter, Transfer Binder, ¶17,067, C.L.C. 76-412, that, even where only a single card is defective and it is submitted with the knowledge of such responsible officer or official, 'the Board may come to the conclusion that it cannot place reliance on any of the evidence of membership submitted by the union'. Where the irregularity relates to evidence of membership procured by a person of lesser rank in the union organization, the Board has taken the position that the card in respect of which the irregularity is established is disallowed and the weight to be given to the remaining evidence of membership will depend on the nature of the irregularity and the extent to which the objectionable practice was resorted to in the signing up of members."

This statement of principle was expanded upon very helpfully in the *Inco Limited* case, [1966] OLRB Rep. Jan. 698 at page 731:

"It is important to keep in mind the reasoning behind these statements of principle which have been referred to so often in the Board's jurisprudence. The basic question dealt with in every case of non-pay or non-sign or other irregularity is the weight that ought to be given the evidence of membership in the circumstances of the particular case. In matters of this kind the Board is not concerned with penalizing a union but rather with representation. See *Echlin-United of Canada Ltd.*, O.L.R.B. Monthly Report, May, 1965, p. 9; *The Hydro Electric Commission of the City of Hamilton*, (1958) C.C.H. Canadian Labour Law Reports, Transfer Binder, '55-'59, ¶18,120, C.L.S. 76/617. Keeping this in mind, what is intended by the statement in the *Webster Air Equipment* case that '... even where only a single card is defective and it is submitted with the knowledge of such responsible officer or official, 'the Board may come to the conclusion that it cannot place reliance on any of the evidence of membership submitted by the union.'"? Clearly, what the Board is saying is that the entire evidence is suspect because, having regard to the dependence of the Board on the documentary evidence submitted, how can it rely on any evidence of membership which such an officer or official has either personally obtained or which was

obtained by others in association with him or under his direction. However, we point out that the Board did not say that this result follows in every case where a single defective card is submitted with the knowledge of a responsible officer or official. The words used are 'the Board *may* come to the conclusion' (emphasis added) and obviously whether it does or does not will depend on the facts of the particular case.

Again, when dealing with a case involving 'a person of lesser rank in the union organization' the same basic question must be considered, that is, the effect of the irregularity or irregularities on the other evidence of membership submitted in the case. If such a person was not responsible for other canvassers or collectors the Board, depending on the circumstances, may merely disallow the card in question or may reject all of the cards signed up by such a person and then deal with the case on the basis of the remaining evidence. If such a person was responsible for the acts of others in the campaign, then the cards signed up by such other persons may also be suspect. See, for example, *Hershey Chocolate of Canada, Limited* case, O.L.R.B. Monthly Report, May 1963, p. 73, *Thomas Dellelce and Company Limited* case, O.L.R.B. Monthly Report January 1962, p. 341, *Max Factor and Company* case, O.L.R.B. Monthly Report, February, 1964, p. 616."

21. The precise issue in the *Inco* case was essentially the same as here, though the facts themselves differ substantially. The *Inco* case involved a bargaining unit with thousands of employees (as compared to 67 in the present case), together with a large number of collectors. The Board stated in the *Inco* case, however, at p. 732, "the cornerstone of the intervener's argument is that the voluntary organizers were given, in effect, sole responsibility for the campaign". That is essentially the situation in our own case. The intervener union in the *Inco* case argued from there that such "turning over" of the campaign to non-officers of the union was sufficient to place the case in category (i) of the *Webster Air Equipment* principle ("responsible union officers"), rather than category (ii) ("rank-and-file employees or officials of lesser rank"). To hold otherwise, the intervener argued, would be to permit the organizing union to "put their hands in their pockets" while improper acts were committed by others. In support of that proposition, the intervener in *Inco* relied upon *Dominion Stores Limited*, [1964] OLRB Rep. Dec. 447 and *Slough Estates*, [1965] OLRB Rep. June 173, as does counsel for the respondent in the present case. The Board in *Inco* also considered the *Walter E. Selck of Canada Limited* case, [1964] OLRB Rep. June 138.

22. In the *Walter E. Selck of Canada Limited* case, *supra*, the Board discovered one non-pay, some irregular dating of receipts, and also some threats of discharge for those who refused to sign union cards, all of which emanated from a rank-and-file employee named Angel. The applicant union relied on the fact that Mrs. Angel held no office in the union. The Board noted, however, that Mrs. Angel essentially ran the campaign on behalf of the applicant, taking leave of absence from her work to do so. In dismissing the application, the Board stated:

"Having regard to the prominent role performed by Mrs. Angel in the organizational campaign, we find that the improprieties revealed in this case cast such serious doubts on the union's evidence of membership that we are unable to place any reliance on it."

23. In *Dominion Stores Limited, supra*, a union steward named Cloutier signed the name of another employee together with a receipt showing a dollar had been paid. Cloutier was in fact the collector on all the cards submitted with the application. In addition, the Board indicated its dissatisfaction with the lack of inquiries made by the union officer who attested to the membership evidence. In dismissing the application, the Board commented:

“It may be that the onus relating to the conduct of the shop steward is not as exacting as that which rests upon the paid union official. In the instant case, however, Cloutier was given the full responsibility for organizing the employees for which the application was made.”

24. After a careful review of the above two cases, together with the *Slough Estates, supra*, the Board in the *Inco* case concluded that they did not go so far as to establish the proposition that the organizing union, by turning over responsibility for its campaign to non-officers of the union, thereby automatically assumes responsibility for their actions. The Board found, therefore, that the collectors in that case still fell within the second category referred to in the *Webster Equipment* case. At page 732 the Board stated:

“While it is true that some of the collectors received some expense money and further, that in the case of the Girards each had acted before for Mine Mill, one some years ago as a paid organizer in a particular campaign, nevertheless, during the present campaign, all were employees of Inco, had never held office in the union, and did not receive money for lost time. In our view, these collectors fall within the category described by the Board in the *Webster Air Equipment* case, *supra*, as ‘persons of lesser rank in the union organization’.”

25. In disposing, however, of the *Slough Estates, Dominion Stores* and *Walter E. Selck Limited* cases, the Board made some elucidating observations on the *Webster Air Equipment Limited* principle, pointing out in effect that the two categories, and in particular the consequences of improper acts by an individual in either of the two categories, are not mutually exclusive. In other words, while the Board is more likely to reject entirely the applicant’s membership evidence where the person involved is a “responsible union officer”, the *Webster* case itself stated only that this *may* be the result, and the Board need not do so in every case. On the other hand, the consequence of improper conduct by persons falling outside this category is also a matter of fact in each case, depending in particular on the connection between that individual and the remainder of the membership evidence. As noted above, the Board in *Inco* pointed out: “If such a person was responsible for the acts of others in the campaign, then the cards signed up by such other persons may also be suspect”.

26. Applying these principles to the case before us, we note that the organizing campaign was initiated and controlled by, at most, the two Gibbons acting as a team. Mr. Dowling of the Retail Clerks Council had no contact with anyone else in the campaign, and all membership evidence was funnelled through the Gibbons. In the circumstances, it is impossible for the Board to be free from doubt concerning the membership evidence filed in this application. On the other hand, Mr. Gibbon acted on his own as collector on only two of the cards, and there is no evidence whatever suggesting improper conduct on the part of Mrs. Gibbon or any other collector.

27. Mr. Gibbon is still a voluntary organizer, and not a “responsible officer” of the applicant, and it must be borne in mind again that the purpose of the Board’s policies in this regard is not to punish (*Inco* case, *supra*). As stated as well in the *Emmanuel Forest Products Limited* case, [1977] OLRB Rep. Feb. 37: “The primary issue in any certification proceeding is the ability of the Board to rely on the documentary evidence filed”. The present case falls short of those involving an actual officer of the Union, or someone acting as collector on all of the cards submitted, but is also a long way removed from those involving persons performing a clearly minor role in the campaign.

28. On balance, the Board is not persuaded that it must reject totally the membership evidence filed by the applicant, as in some of the cases referred to above. However, as has been said in other cases:

“The membership evidence submitted in this case is under a cloud and requires the confirmatory evidence of a representation vote.”

(e.g. *Echlin-United Canada Limited*, [1965] OLRB Rep. May 91; *Hydro-Electric Commission of Hamilton*, 58 CLLC ¶18,120.)

29. The Board is mindful of the fact that the applicant intended ultimately to lead evidence in this case in support of its request that the Board exercise its discretion under section 7a of *The Labour Relations Act* to certify the applicant without a vote. As the Board noted in *Cantor Bakeries*, [1978] OLRB Rep. April 281, however, in dealing with the section 7a request before it: “One of the factors which the Board must consider in assessing the membership support of the applicant at the time of the hearing is the quality of the membership evidence filed in support of the application”.

30. For all of the foregoing reasons, therefore, the Board directs that a representation vote be held amongst the employees in both bargaining units, defined by agreement of the parties as follows:

“All employees of the respondent at Burlington, Ontario, save and except Assistant Managers and persons above that rank, Kitchen Managers, Bookkeepers, Management Trainees, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period (hereinafter referred to as bargaining unit #1).”

“All employees of the respondent at Burlington, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Assistant Managers and persons above that rank, Kitchen Managers, Bookkeepers and Management Trainees (hereinafter referred to as bargaining unit #2).”

31. All employees of the respondent in both bargaining units on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

32. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

33. Since the most that the statement of desire in opposition to the applicant filed in this matter could produce is a representation vote, it is not necessary for the Board to make any further inquiry into the origination or circulation of that statement.

34. The matter is referred to the Registrar.

2218-79-U Michael N. Grunwell, Complainant, v. Fanshawe College of Applied Arts and Technology, Respondent, v. Ontario Public Services Employees Union, Intervener.

Change in Working Condition – Parties – Employees alleging violation of statutory freeze under The Colleges Collective Bargaining Act, 1975 – Filing of complaint not authorized by union – Whether employees have standing to bring complaint independent of union

BEFORE: George W. Adams, Chairman and Board Members F. W. Murray and B. L. Armstrong.

APPEARANCES: *Michael H. Grunwell, E. Ross Rachar and Joseph Dunlop-Addley for the complainant; F. G. Hamilton and others for the respondent; and Chris G. Paliare and Gerry Griffin for the intervener.*

DECISION OF THE BOARD; April 11, 1980

1. This is a complaint under section 78 of *The Colleges Collective Bargaining Act, 1975*, alleging a violation of section 55(1) of the said Act.

2. Section 55(1) provides:

“Where notice has been given by either party to an agreement under section 5, except as altered by an agreement in writing by the parties, the terms and provisions of the agreement then in operation shall continue to operate until there is a right to strike or lock-out as provided in this Act.”

3. The complainants, five employees of the respondent allege that the respondent's president improperly altered their terms and conditions of employment on or about February 22, 1980 by paying them amounts of money in excess of their regular salary payments – the contested salary adjustments having been described to them by the respondent as “required by the new Memorandum of Agreement.” They take the position (1) that no new memorandum of agreement was properly ratified by the membership of the intervener trade union, having regard to the policies and procedures of the Colleges Relations Commission; (2) that, alternatively, the new memorandum of agreement did not provide for the immediate payment of salary adjustments; and (3) that there does not exist any other agreement in writing specifically authorizing the alteration of salary levels under section 55(1) of the said Act.

4. The respondent challenges the status of the complainants to lodge the complaint, submitting that section 55(1) is designed to protect the bargaining rights of the intervener trade union and it has not authorized the instant complaint. It further argues that, in any event, the salary increase complained of took place at the request of the intervener trade union which is the exclusive bargaining agent of the complainants and that the contested alteration in conditions of employment is adequately documented by an agreement in writing when the said document is read against the background of the parties' past practices and oral communications.

5. The intervener requests that the complaint be dismissed because it has not authorized the lodging of the complaint and because it consented to any and all increases in salary which were paid to the academic staff of the community colleges on or about February 22, 1980.

6. The Board decided to hear evidence which pertained to the status of the complainants to lodge the complaint and to the related issue of whether or not the contested salary increases were adequately supported by an agreement in writing as provided for by section 55(1). The Board reserved its decision on the issue of the complainants' status to address this second issue. The complainants therefore were permitted to adduce evidence and make argument on the second issue under the Board's general reserve as to their status to do so. It was thought that this approach would provide the Board with sufficient background to deal meaningfully with the issue of the complainants' status, while avoiding the need for an additional hearing if it was subsequently determined that the second issue was properly before the Board.

7. The background to this complaint is not in dispute. *The Colleges Collective Bargaining Act, 1975*, defines an employer as a board of governors of a college of applied arts and technology but the Ontario Council of Regents for Colleges of Applied Arts and Technology is given the exclusive responsibility for all negotiations on behalf of employers by virtue of section 2(3). Thus, bargaining under the Act is province-wide and in this instance involves 22 colleges and 6500 full-time academic employees and several thousand "partial load" employees. Introduced into evidence was a collective agreement pertaining to these employees and having a term of September 1, 1977 to August 31, 1979. Notice to bargain for the renewal of this collective agreement was given in the appropriate manner. Bargaining ensued to the point where final offer and strike authorization votes were conducted under section 60(1) of the Act. The results of these ballots saw the Council's last offer rejected and the request for strike authorization defeated. Mediation then followed, with no right to strike having accrued, and a memorandum of agreement dated December 8, 1979 was subsequently entered into. The trade union, with the required assistance of the Colleges Relations Commission, conducted a ratification vote with respect to the memorandum of agreement on January 15, 1980 and representatives of the Council were advised by representatives of the trade union that the unofficial tally was in favour of the agreement. However, shortly after the taking of the vote, an employee of the respondent filed a complaint with the Colleges Relations Commission challenging the ratification vote on the basis of alleged insufficiencies in information provided to the membership and alleged misrepresentations made by the intervener trade union. The complainant before the Commission is not one of the complainants before this Board and his complaint appears to have been filed under paragraph 9 of CRC Policy No. 17 which provides:

"No one shall

- (a) coerce or unduly influence any employee in the bargaining unit with regard to his vote;
- (b) interfere with the secrecy of the ballot; or
- (c) remove any notice or document posted under these procedures.”

8. Paragraph 20 of the same policy provides:

“In the event of an objection to the conduct of the vote or of the counting of ballots, the Returning Officer shall collect, hold and seal all ballots until a determination on the objection has been made.”

However, notwithstanding this latter provision, it was the evidence of Gerry Griffin, Chief negotiator for the trade union, that officials of the Commission conducted an official tabulation of the results of the ratification vote in the presence of representatives of both parties on January 21, 1980 and this count confirmed the acceptance of the memorandum of agreement.

9. It is to be noted that the memorandum of agreement dated December 8, 1979 provided for a wage increase effective August 31, 1979. Because of complaints by employees about the delay in implementing new wage increases, the parties have come to adopt a system of implementing wage increases on the ratification of a memorandum of agreement but before the signing of a formal collective agreement. This was the practice followed for the 1977-79 collective agreement and, following January 21, 1980, Griffin asked Angelo Pesce, representing the Council, that the practice be followed in 1980. Pesce agreed provided that Griffin give him a letter confirming that the memorandum of agreement had been ratified. In response, Griffin wrote the following letter to Pesce dated January 21, 1980:

“Dear Mr. Pesce:

This is to advise you that the tentative settlement between the Ontario Council of Regents for Colleges of Applied Arts and Technology and the Ontario Public Service Employees Union representing the academic staff was ratified January 15, 1980.”

10. Following the receipt of this letter, Pesce prepared instructions for the implementation of the wage increases by the 22 colleges and the instructions went out over the signature of Norman E. Williams, Chairman of the Council of Regents, by memorandum dated January 23, 1980. Pesce testified that it takes about a month to complete the paper work and implement salary increases across the system, although smaller colleges are able to implement their increases in a shorter period of time.

11. Pesce further testified that on January 31, 1980 the solicitor to the Council of Regents advised him of a Globe & Mail report indicating that a complaint about the conduct of the ratification vote had been made to the Commission and, subsequently, an investigator appointed by the Commission made official contact with the Council in mid-February. As a result of this information, the Council has taken the position that the formal signing of the collective agreement and the related implementation of other benefits ought to wait the conclusion of the Commission's investigation. Thus, the contractual benefits of over 6,500 employees are now awaiting the resolution of the complaint of one employee. However, the retroactive wage increases were implemented and it is this action, in the face of the College Relations Commission's inquiry, that these five complainants contest.

12. It is to be noted that the 5 complainants are the only employees to complain of this action. Moreover, they do not wish the employers to reclaim the monies distributed but merely wish a declaration from this Board that the Act was violated.

13. This complaint must be dismissed and we so rule.

14. We are satisfied that the complainants lack the standing to file a complainant based on section 55(1) in these circumstances. We are also satisfied that Griffin's letter of January 21, 1980, read against the memorandum of agreement and the relationship of the parties, constitutes a properly authorized agreement in writing within the meaning of section 55(1). However, we need make no definitive ruling in this latter respect because the complainants lack the standing to put the issue before us in the circumstances. We would further note that the complaint before the Colleges Relations Commission does not affect the intervener's authority, as the exclusive bargaining agent of all the employees it represents, to consent to changes in conditions of employment under section 55(1).

15. We agree with the submissions of counsel for the respondent and intervener that section 55(1) is designed to protect the bargaining rights of the trade union bargaining agent and that an employee organization such as the intervener is the exclusive bargaining agent of the employees in a bargaining unit. These two labour relations principles mean that the complainants cannot bring the instant complaint in their own names and, particularly, without the consent of the intervener.

16. This complaint is dismissed.

0956-79-M; 1222-79-R; 1223-79-R International Union of Operating Engineers, Local 793, Labourers' International Union of North America, Local 247, Applicants, v. **Donald A. Foley Limited** and Kingston Sand & Gravel Ltd. and/or Kingston Aggregates and/or Maceron Limited and/or 429185 Ontario Limited, Respondents.

Related Employer – No common ownership – Close sub-contracting relationship – Financial dependence between employers – Whether under common direction

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members F. W. Murray and W. F. Rutherford.

APPEARANCES: *B. Fishbein, P. Gauthier, G. Steers, M. Sullivan and I. Rafeiro for the applicant; Don Foley for Donald F. Foley Limited and Jim Cameron for Kingston Sand & Gravel Ltd., Kingston Aggregates, Maceron Limited and 429185 Ontario Limited.*

DECISION OF N.B. SATTERFIELD, VICE-CHAIRMAN AND BOARD MEMBER W.F. RUTHERFORD; April 18, 1980

1. The names "D. A. Foley Construction Ltd. and Maceron Construction" appear-

ing in the style of cause as respondents are amended to read: "Donald A. Foley Limited" and "Maceron Limited". For reasons given hereunder, 429185 Ontario Limited is made a respondent to the proceedings in File No. 1222-79-R and File No. 1223-79-R.

2. File No. 0956-79-M is a referral to arbitration under section 112a of *The Labour Relations Act* of a grievance in the construction industry. It was first heard by the Board on September 7, 1979 and adjourned until a date to be set by the Registrar. Subsequently on September 26, 1979, before the matter was re-scheduled, the applicant International Union of Operating Engineers, Local 793 ("the Engineers") filed an application under sub-section 4 of section 1 and section 55 of the Act, File No. 1222-79-R. A similar application was filed on September 26, 1979 by the Labourers' International Union, Local 247 ("the Labourers"). All three files were scheduled for hearing on November 14, 1979. At that hearing the Board ruled that it would hear and decide first the applications in File No. 1222-79-R and File No. 1223-79-R since its decision would affect whether the Engineers would pursue the grievance in File No. 0956-79-M.

3. The Engineers and the Labourers are alleging that there has been a sale of a business within the meaning of section 55 between Donald A. Foley Limited and one or more of Kingston Sand and Gravel Ltd., Kingston Aggregates, Maceron Limited and 429185 Ontario Limited. Or, in the alternative, that Donald A. Foley Limited and one or more of those same respondents are companies which, within the meaning of section 1(4), constitute one employer for purposes of the Act. Substantial evidence was heard by the Board during six days of hearings which took place over two months. Having reviewed and considered all of the evidence the Board finds the significant facts to be as set out hereunder but does not regard section 55 as being applicable to these facts. Nor was section 55 argued by the applicants.

4. It remains, then, for the Board to make a determination under subsection 4 of section 1 of the Act which reads as follows:

"Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate."

5. The respondent Donald A. Foley Limited ("Foley") was incorporated August 22, 1969. Mr. Donald A. Foley, who was the only witness for Foley, is the sole owner, director and president of the company. Foley is a general contractor engaged primarily in road building but which also does sewer and watermain construction and building excavation. It does work with its own work force and, as well, sub-contracts to other contractors such work as: curbs and gutters, electrical, mechanical, asphaltting, concreting, fencing, pipe laying and the supplying and levelling of gravel. Mr. Foley stated that his company uses some 32 sub-contractors from time to time, including the respondents Maceron Limited and Kingston Aggregates. Foley's average 1979 workforce of engineers and labourers combined was 15.

At all material times, the Engineers and Labourers were entitled to bargain on behalf of the operating engineer and labourer employees of Foley. The Engineers and Foley are parties to a collective agreement signed May 24, 1979 and which purports to operate from May 1, 1979 until April 30, 1980. The Labourers and Foley are bound to a collective agreement which purports to operate from May 1, 1979 until April 30, 1981, but which was signed October 23, 1979 according to the undisputed evidence of Mr. Isadore Rafeiro, secretary-treasurer of the Labourers. Both collective agreements are successor agreements to earlier ones.

6. The respondent Maceron Limited ("Maceron") was incorporated on August 11, 1976 and as of December 17, 1976 was substantially organized for business with Mr. James Cameron as the sole owner, director and president of the company. Maceron engages in the construction business as a general contractor and sub-contractor doing sewer and watermain work, building excavation and rock drilling, blasting and crushing. During 1978, Maceron did work by sub-contract for Foley. Maceron is not a party to or bound by any collective agreement with the Engineers or Labourers or any other trade union.

7. Kingston Aggregates is the name under which the numbered corporation 429185 Ontario Limited trades in business. Letters patent were issued to the numbered corporation subsequent to these applications on October 26, 1979 and it was substantially organized for business by December 17, 1979 with Mr. James Cameron as its sole owner, director and president. Mr. Cameron, who was the only witness for his companies, told the Board that he decided in March 1979 to start a new company to operate a quarry to complement his construction business. Since he realized it would take time to acquire a property and a license to operate it as a quarry, he decided also to engage the new company in construction in the interim in order to build capital. Cameron decided upon the name Kingston Sand and Gravel Ltd. ("Kingston Sand"), arranged a \$50,000 line of bank credit and by March 9, 1979 received his first contract for work which was from Foley. Cameron applied in April to have Kingston Sand incorporated but was advised by his lawyer in late August that the name was unavailable for use. Cameron adopted the trading name of Kingston Aggregates and in late September applied for incorporation of 429185 Ontario Limited. Kingston Aggregates either in that name or in the name of Kingston Sand engages in the same kind of construction work as Maceron and has performed work in 1979 for Foley under sub-contracts. Kingston Aggregates also is the purchaser in an agreement of sale and purchase for a property on which it intends to operate a quarry and for which purposes it is awaiting a decision from the Ontario Municipal Board on an application for a license to operate a quarry. Kingston Aggregates is neither a party to nor bound by any collective agreement with the Engineers or Labourers or any other trade union. During June, July and August 1979 its combined workforce ranged from 30 to 55 employees.

8. Mr. Cameron relies on word-of-mouth advertising and his own knowledge of and reputation in the construction business in the Kingston area to get work. Neither of his companies is listed in the telephone director and do not have their own telephone numbers. Mr. Cameron uses his home telephone for business purposes. His home mail box (R.R. #8, Kingston) bears the name Maceron Limited but not the name Kingston Aggregates. Neither the equipment owned by Mr. Cameron, nor rented from Foley bears any identification with Maceron or Kingston Aggregates. When either company is on one of Foley's projects its name does not appear on any project sign, but this is no different from other sub-contractors on these projects. Other sub-contractors, however, have project offices and use safety barriers.

ers and equipment which bear their names. Maceron and Kingston Aggregates use rented equipment and barriers, which bear no identification with the two companies but instead bear the name of the renter, Foley.

9. Mr. Foley is not a shareholder, director, officer or employee of Kingston Sand, 429185 Ontario Limited or Maceron. Mr. Cameron is not a shareholder, director, officer or employee of Foley or of any other companies owned by Mr. Foley about which we heard evidence but which have no other relevance to these matters. Kingston Aggregates and Maceron share the same head office address and it is not the same as Foley. Foley and Kingston Aggregates have accounts in the same bank branch but Maceron's account is with another bank. It may be reasonably inferred from the evidence that Foley does not use the same solicitors or accountants as the other respondents.

10. As may be seen from some of the foregoing facts the contractual relations between Foley and Kingston Aggregates or Maceron are that of general contractor and sub-contractor. While Kingston Aggregates and Maceron each also performed as a general contractor, neither sub-contracted work to Foley. Maceron (with the exception of one job) and Kingston Aggregates have not competed with Foley for the larger jobs because they are not eligible for the bonding commonly required to bid and perform large construction jobs. Foley in turn is not interested in the smaller jobs which the two companies could perform on their own. In 1977 Maceron did no more than \$10,000 in business and there is no evidence that any of it was for Foley. Maceron did total business of \$290,000 in 1978, of which \$48,000 was on three jobs for Foley. Maceron rented construction equipment and obtained the fuel and lubricants used in the equipment from Foley. Maceron did not bill Foley and Foley did not bill Maceron and no payment exchanged hands until the end of 1978 when they exchanged cheques for the gross amounts of business transacted between them. Foley estimated the total value of its contracts in 1978 to be \$2 million. Maceron has not done any work for Foley since December 1978 and did not perform work for any customers in 1979. Foley has approximately \$3,000,000 of contracts in 1979, the bulk of which came from five major projects. Kingston Aggregates had sub-contracts on four of the five projects worth approximately \$700,000. The total value of Kingston Aggregates business with Foley in 1979 was \$815,000, \$100,000 of the additional value coming from stone drilling, blasting and crushing and the remainder for stone delivery. By comparison, Foley sub-contracted asphaltting, concreting and the supplying and levelling of gravel to three other contractors for a total value of approximately \$700,000 plus another \$135,000 for trucking let to yet other contractors for a total value of \$845,000. The total of \$1,660,000 of sub-contracts to Kingston Aggregates, the three other contractors and the trucking contractors represents the majority of the work sub-contracted by Foley. While Mr. Foley's testimony was that Foley's sub-contracts were awarded on a competitive bid basis, a large part of the work which Kingston Aggregates did on the four Foley projects was sewer and watermain with some road-work and excavation and there is no specific evidence before us of competitive bids for this type of work. Kingston Aggregates did work valued at \$165,000 in 1979 for eight other contractors bringing the total value of its 1979 contracts to \$980,000.

11. The general contractor/sub-contractor relationship between Foley and Kingston Aggregates is not the full extent of the business relationship between the two companies. Kingston Aggregates owns tools and equipment valued at approximately \$20,000, included in which are a half-ton truck and a car. Kingston Aggregates chooses to rent rather than own all of the remaining equipment which it requires. In 1979 it spent approximately \$325,000 on

equipment rentals of which all but \$32,000 was for equipment rented from Foley. The equipment was rented from Foley on a daily, weekly or monthly basis as needed. For some equipment, Foley supplied the operator, but most of it was rented without operator. Fuel, grease and oil worth \$38,500 were supplied by Foley and charged to Kingston Aggregates but payment was not required until accounts between the two were settled at the end of the year. The same conditions applied to \$178,000 of building materials supplied by Foley and \$438,000 for payroll advances made by Foley to Kingston Aggregates. This latter amount was advanced weekly against invoices submitted by Kingston Aggregates to Foley in amounts equivalent to Kingston Aggregates weekly payroll costs for all labour employed by it without regard to whether it was for labour employed on Foley's or other projects. During this same period, Kingston Aggregates only used about \$15,000 of its bank credit. After allowing for back charges from Kingston Aggregates to Foley, the net amount owing from Kingston Aggregates to Foley was approximately \$875,000, or some \$60,000 more than the work performed by Kingston Aggregates for Foley during the same period. Mr. Cameron testified that he expected to recover the \$60,000 shortfall from the \$165,000 owed by other clients, since the labour, fuel and equipment rental costs incurred in doing that work are already accounted for in Foley's charges to Kingston Aggregates.

12. When Mr. Cameron started business using the name Kingston Sand he made arrangements with Brenda Brown, one of Foley's employees to organize and administer Kingston Sand's payroll. Mr. Cameron opened an account for Kingston Sand at the same bank used by Foley for Ms. Brown's convenience because she handled Foley's payroll and dealt at the bank for that purpose. She also made all the arrangements with the Unemployment Insurance Commission, Revenue Canada, Workmen's Compensation Board and others as required and arranged to have all returns sent to Foley's office at 800 Burnett Street, Kingston. After the commencement of this case (and therefore after adopting the name Kingston Aggregates), this was all changed to Mr. Cameron's residence address, R.R. #8, Kingston. Kingston Aggregates' head office is at Mr. Cameron's residence address and he maintains an office in his home from which he conducts his business. Ms. Brown receives the time records for Kingston Aggregates employees, prepares the weekly payroll and the invoices to Foley for the advance to cover the payroll, makes the bank deposit and issues the payroll cheques. She also does some general typing for Kingston Aggregates. All of this is said to be done on her own time, either at home or during free time at the office. Mr. Foley may not have been aware and given his approval to this arrangement when it was set up, but he allows it to operate and told the Board that Kingston Aggregates would be billed at an hourly rate for the work. According to Mr. Cameron, the arrangement is for him to pay Ms. Brown at an agreed hourly rate for her work for Kingston Aggregates. It is unnecessary for the Board to decide which is the correct version.

13. Mr. Cameron uses for Kingston Aggregates' benefit other facilities of Foley. Clients know he can be reached at Foley's office and messages are left there for him. Mr. Cameron on average is in Foley's office every other day for a couple of hours and he has hired employees from that office for his companies. He has two-way radios that use the same frequency as that used by Foley, although there is a third party who subscribes to the same commercial service and, like Mr. Cameron, has access to Foley's frequency. Employees of Kingston Aggregates use Foley credit cards to purchase material for supply and installation on Foley projects and also for equipment, fuel and lubricants used in Kingston Aggregate's vehicles and equipment rented from Foley, payment for which is made when the accounts between Foley and Kingston Aggregates are settled at the end of the year. In fact, it was the

unchallenged evidence of the Kingston Aggregates serviceman, who fuels the equipment for Kingston Aggregates and Foley and picks up other material and supplies for Kingston Aggregates using Foley credit cards, that he has never charged anything to Kingston Aggregates. While Mr. Foley maintains that any of his contractor clients can order material charged to Foley for its projects, there is no evidence that this is on the same payment terms as apply to Kingston Aggregates. Kingston Aggregates is not eligible for bonding so it relies on the protective umbrella of Foley's bonds when bid or performance bonds are required. Kingston Aggregates has the privilege of crushing stone for its own use from a quarry owned by Foley and paying a royalty for stone used, with payment terms being the same as for other materials. While Kingston Aggregates does quarrying and crushing for Foley and another client, it does not have the same privilege of using the other client's quarry. Although it was Mr. Cameron's evidence that his employees only did repairs or maintenance to the equipment rented from Foley that could be done on site to avoid temporary loss of use of the equipment and, further, that Foley was responsible for any breakdown repairs, the evidence of some Kingston Aggregates employees was that they serviced equipment used by Kingston Aggregates in Foley's Kingston shop.

14. Kingston Aggregates co-operates with Foley in other ways. Kingston Aggregates' fuel truck driver fuels equipment used by Foley in projects in Kingston and Kingston Aggregates back-charges Foley for the cost of the fuel supplied. Equipment which Kingston Aggregates rents from Foley on a monthly or weekly basis, which is usually operated by a Kingston Aggregate employee, can be diverted for a day or two at a time by Mr. Foley to other Foley customers. When this happens Foley is back-charged for the equipment rental and the operator, to be settled in their overall accounts.

15. The evidence also reveals that Messrs. Cameron and Foley at different times took independent actions with the other's employees which both characterize as helping one another out. William Robinson, who had been employed by Foley during 1978, worked as a truck driver for Kingston Aggregates in 1979. When he was hired on by Kingston Aggregates, he was called by Mr. Foley to his office and asked if he wanted to do the same work which he had done in 1979. He accepted and was told by Mr. Foley where to report. While Robinson thought he was going to work for Foley, his first pay cheque was from Kingston Sand and he realized his employer was not Foley. All of his subsequent regular pay cheques were from Kingston Sand and Kingston Aggregates. He was, however, a participant in a pay system known as an hours bank by which hours worked in excess of a certain weekly maximum were not paid for at the time worked but were recorded in the bank and could be drawn on when there were weeks of short hours. When Mr. Robinson drew on the bank it was his uncontradicted evidence that he was paid by Foley cheques. In another incident involving payment of wages, a Kingston Aggregates employee, Leroy Fox, went to Foley's office about an underpayment because he was unable to contact Mr. Cameron. While the employee was noisily discussing the problem with one of Foley's employees, Mr. Foley came out of his office to see what was going on. When the short payment was explained to Mr. Foley, he instructed his employee to prepare a cheque to Mr. Fox for the missing amount. The cheque was issued on Foley's account and signed by Mr. Foley. While he explained this as merely a convenient way of ending the disruption created by the Kingston Aggregates employee, it was Mr. Fox's evidence (and he was not contradicted) that Mr. Cameron was in Mr. Foley's office while the incident took place. A former Maceron employee, John Otenhof, who worked for Foley in 1979 thought he had been hired by Mr. Cameron but admits he was paid by Foley. Mr. Cameron contends that he had known Mr.

Otenhof for many years and had only referred him to Mr. Foley for employment. Nonetheless Mr. Cameron later interceded with Mr. Foley to get a raise in pay for Mr. Otenhof and also signed a Workmen's Compensation Board form reporting the period during 1979 that Mr. Otenhof had worked for Foley. When Mr. Otenhof filed a pay grievance with Foley, he was called from a job by Mr. Cameron to come to Foley's office. When the employee arrived at the office Mr. Cameron told him that he would have to await Mr. Foley's arrival. The employee was subsequently called into Mr. Foley's office in Mr. Cameron's presence and asked about the grievance.

16. Another area of co-operation between Foley and Kingston Aggregates is in respect of the picking up of weekly time sheets for both companies from job sites, their delivery to Brenda Brown in Foley's office and the subsequent delivery of pay cheques to the job sites. Kingston Aggregates' serviceman routinely collects the time sheets of Foley and Kingston Aggregates from job sites in Kingston and Napanee and delivers them to Ms. Brown. He picks up the pay cheques from her and delivers them to the job sites.

17. Section 1(4) of the Act grants discretion to the Board to treat two or more entities as though they constitute one employer for the purpose of the Act if:

- (a) more than one corporation, firm individual, association or syndicate is involved;
- (b) the entities are engaged in associated or related businesses or activities, whether or not simultaneously; and
- (c) the entities are under common control or direction.

One of the significant purposes of section 1(4) is to guard against the dilution or undermining of bargaining rights already obtained such, for example, as occurs when work is diverted from a unionized employer to an associated, newly created non-union one as in *Evans-Kennedy Construction Limited*, [1979] OLRB Rep. May 388; or when there is a risk or threat that bargaining rights may be eroded, as in *West York Construction Limited*, [1978] OLRB Rep. Sept. 879. For a more detailed review of the purpose of section 1(4), however, see *Industrial Mine Installations Limited*, [1972] OLRB Rep. Oct. 1029 at paragraphs 9 to 13 inclusive.

18. It is stating the obvious to say that there is more than one entity involved here and it is clear on the facts that Donald A. Foley Limited, Maceron Limited, Kingston Aggregates (and therefore 429185 Ontario Limited) are engaged in the same kind of construction work. Thus they are most certainly engaged in related activities. Insofar as we are concerned with Kingston Sand and Gravel Ltd., it may be inferred from the unavailability of that name to Mr. Cameron that it is attached to some other entity. We have no evidence other than its use as a predecessor name in trade to the name Kingston Aggregates used by 429185 Ontario Limited and it is only in that context that any further reference will be made to Kingston Sand. Therefore the section 1(4) application in respect of Kingston Sand and Gravel Ltd. is dismissed. Having found that Foley, Maceron, Kingston Aggregates and 429185 Ontario Limited meet the first and second pre-conditions to a section 1(4) declaration, do they meet the third one of being under common direction or control? The evidence does not support a finding that Foley and any of Mr. Cameron's companies are under common direction,

therefore if the Board is to be satisfied as to this third condition, the facts must establish to the Board's satisfaction that Foley and one or more of Mr. Cameron's companies are under common control.

19. There is no doubt on the evidence that Maceron and 429185 Ontario Limited trading as Kingston Aggregates are being operated under the common direction and control of James Cameron their sole shareholder, director and president. There is nothing in the facts in respect of the relationship between Foley and Maceron which convinces the Board that they are under common control. So the answer to the question of whether Foley and one or more of Mr. Cameron's companies are under common control must be found in the facts pertaining to the relationship between Foley and Kingston Aggregates. In determining if they are under common control, the Board must examine the total extent and nature of the existing relationship within the context of section 1(4). The Board is assisted in doing so by applying to the facts of that relationship the criteria set forth in paragraph 21 of *Walter's Lithographing Company Limited*, [1971] OLRB Rep. July 406 which states:

"The indicia or criteria which the Board considers relevant in making a determination as to whether the activities of businesses of one or more corporations, individuals, firms, syndicates or associations, or any combination thereof are carried on under common direction and control and therefore may be treated as one employer are – (1) common ownership or financial control, (2) common management, (3) interrelationship of operations, (4) representation to the public as a single integrated enterprise, and (5) centralized control of labour relations. No single criterion is likely to decide the issue. Rather, as has been stated, the Board's determination undoubtedly will be based on an appraisal of all of them in the light of the particular facts before it. It hardly need be said that in applying the above criteria, the greater the degree of functional coherence and interdependence which the Board finds among the associated or related activities and businesss the more probable it is that the Board will conclude that the entities carrying on these activities should be treated as one employer. We would mention here also that the indicia or criteria themselves obviously overlap. For that reason, in applying them to the facts of the instant case we have not attempted to deal with each other criterion on an individual basis."

20. This is a case in which what does not exist in the relationship between two entities is more readily apparent than what does exist. There is no common ownership, directors or officers; no common head office; no common solicitors or accountants; no common telephone lising; no common cheques; and in the usual sense of the terms, no common management, office or premises, or common control of wages, benefits and working conditions. These circumstances are a natural consequence of the fact that there is no corporate interrelationship between Foley and Kingston Aggregates. But section 1(4) both allows and requires the Board to examine the degree of functional interdependence which exist between business entities so it must also look at the contractual and economic arrangements between them, and, in fact, at all elements of interdependence.

21. The Board finds if helpful to begin with an examination of the development, extent and nature of the subcontracting relationship between Foley and Kingston Aggregates.

Mr. Cameron, having generated and executed \$290,000 of business through Maceron in 1978, conceived the idea in March 1979 of a new company which would operate a quarry to complement Maceron's construction business. Maceron is left idle while the new company does construction work to build capital. Within a few days of the idea and four or five weeks before deciding to incorporate, Mr. Cameron has accepted (in the name Kingston Sand) a purchase order for his first job from Foley. Within nine months Kingston Aggregates has done \$700,000 sub-contracting on four projects for Foley, plus another \$115,000 of other work. The average value of each of the four Foley projects to Kingston Aggregates was greater than the gross value of the work it did for eight other contractors. In 1978 the business Maceron did with Foley represented 16.5 per cent of Maceron's gross. Kingston Aggregates, in 1979, did nearly three and a half times as much business as Maceron, but the value of Foley sub-contracts represented 85 per cent of Kingston Aggregates' gross volume. Maceron did \$242,000 or nearly 85 per cent of its 1978 business with clients other than Foley, yet Kingston Aggregates did only \$165,000, or about 15 per cent of its gross volume with other clients in its first year of operation.

22. Kingston Aggregates did business of nearly \$1 million in 1979 on working capital advanced almost entirely from Foley by means of the credit arrangements between the two companies. Kingston Aggregates obtained net working capital of \$875,000 from Foley in this manner while at the same time having to commit in its own rights only \$20,000 in equipment and tools and \$15,000 of bank credit. While this indicates a great degree of financial dependence of Kingston Aggregates on Foley, it does not follow automatically that the dependent gives Foley control of Kingston Aggregates. There are, however, other indications that Foley exerts some influence and control over Kingston Aggregates. Kingston Aggregates does not bid in competition with Foley. Foley's employee, Brenda Brown, has cheque signing authority with Kingston Aggregates, prepare its payroll, invoices Foley for the weekly payroll advances and types Kingston Aggregate's bid proposals to Foley and also does Foley's payroll work, issues Foley cheques for weekly payroll advances to Kingston Aggregates and does the banking related thereto for both Kingston Aggregates and Foley at the same bank. Mr. Robinson was hired by Mr. Foley for Kingston Aggregates and received payments out of the hours bank system on Foley cheques. Mr. Foley directed that a pay adjustment be made to Mr. Fox, and had a Foley cheque issued for that purpose. Mr. Cameron's involvement with Mr. Otenhof's employment relationship with Foley goes sufficiently beyond referring or recommending him for employment so as to be characterized as Mr. Cameron being responsible to Foley for Mr. Otenhof's employment. Mr. Foley can divert to Foley's other customers equipment which it has on rent to Kingston Aggregates along with Kingston Aggregates' operator.

23. The Board is satisfied that there is no evidence to support the applicants' claim that the field forces of Kingston Aggregates and Foley were directed by each other's supervisors. The most that could be made of the evidence is that supervisors of one of the companies issued instructions to employees of the others as to the proper sequencing of work according to the contracts between them, a common occurrence on construction sites. The same cannot be said however about the above referred circumstances in respect of Messrs. Robinson, Fox and Otenhod. In the Board's view those circumstances, taken together with the ability of Foley to divert equipment rented to Kingston Aggregates are at least strongly suggestive that Messrs. Cameron and Foley are involved in some common management control of Kingston Aggregates and Foley.

24. Many aspects of the relationship between Foley and Kingston Aggregates speak to a substantial functional interdependence. For example, Kingston Aggregates' use of the 800 Burnett Street, Kingston, address for its payroll cheques and for the various payroll related remittances and returns, as well as Mr. Cameron's personal use of the premises; his use of Foley's radio frequency, and the miscellaneous business uses which he made of the premises already referred to herein. Kingston Aggregates' dependence on Foley for supplies of equipment fuel and lubricants and building material, its use of Foley's shop for performing equipment maintenance, its use of Foley's quarry for Kingston Aggregate's aggregate supply and Kingston Aggregate's dependency on Foley for the availability to Kingston Aggregates of the large jobs done by Foley which Kingston Aggregates cannot get on its own because it is not bondable are yet other aspects of this interdependence. While for Foley it may be an interdependence of convenience, it does depend on Kingston Aggregates to fuel Foley equipment in the Kingston area and to pick up Foley time sheets and deliver Foley pay cheques for jobs in Kingston and Napanee districts.

25. Kingston Aggregates has no discernible public identity, not even to the extent of having a name on a rural mail box which Maceron enjoyed. There is little or nothing in the way of an outward sign that it is in business, no telephone listing, none of the trappings ordinarily associated with even a private business concern. There is nothing on Foley's job sites that would indicate Kingston Aggregate's presence on them. When Kingston Aggregates is on projects other than Foley's virtually all of the visible equipment and safety barriers used by Kingston Aggregates bear Foley's name and there is no visible sign to the public of Kingston Aggregate's presence on the site. In fact, Foley's name appearing on barriers and equipment give the appearance that it is Foley forces which are on the job. Kingston Aggregate's identity is even obscured to many of its suppliers because of its use of Foley's credit cards. Even Kingston Aggregate's identity with the Workmen's Compensation Board, Unemployment Insurance Commission and Revenue Canada are through Foley's head office address. Mr. Cameron, who relies on his reputation in the construction business for Kingston Aggregate's business opportunities, is known to be reachable through Foley's office and mobile radio frequency. In the result, Kingston Aggregate's identity is totally submerged with that of Foley and publicly Foley and Kingston Aggregates appear as one concern, Foley.

26. While Messrs. Foley and Cameron each maintain that they control the employee relations for his own company only, there is evidence that Mr. Foley, as well as controlling the employee relations of Foley, exerts some effective control over Kingston Aggregate's employee relations. The most visible sign is with the payroll procedure. Kingston Aggregate's serviceman delivers the weekly time sheets to Foley's employee Brenda Brown for all of Kingston Aggregate's employees as well as for Foley's employees in the Kingston and Napanee areas. Ms. Brown prepares the payroll for both companies, invoices Foley for the payroll advance to Kingston Aggregates and issues Foley's cheque to Kingston Aggregates for the amount of the invoice, prepares the payroll cheques for both companies and gives them to the serviceman who delivers them and completes the cycle. Other indications of Mr. Foley's control is his issuing of a Foley pay cheque to Fox and the payment of Robinson on a Foley cheque for hours withdrawn from the hours bank. Mr. Cameron's intercession with Mr. Otenhof, a Foley employee, to get him a raise in pay, the signing of the Workmen's Compensation Board form for Mr. Otenhof and Mr. Cameron's part in the grievance filed by the employee indicate that Mr. Cameron was acting with authority or direction from Mr. Foley.

27. This case has several interesting aspects to it compared with many applications which raise section 1(4) of the Act. The most significant is the absence in this case of any ownership connection, either direct or through a third party, of any form of corporate inter-relationship including common directors, officers, solicitors or corporate familiar relationship between Foley and Kingston Aggregates. In the majority of cases, the Board is attempting to determine if there is common direction or control between entities carrying on related activities or business, between which there is some form of ownership connection or corporate inter-relationship. Another unusual feature of the case is the virtual absence of any public identity of Kingston Aggregates. While the Board occasionally deals with section 1(4) cases involving a party or parties the public identity of which is obscure (see for example *Del Zotto Enterprises Limited*, [1973] OLRB Rep. Aug. 533), in most instances the Board is dealing with circumstances where all of the parties have some public identity, unlike the situation before us where there is no outward appearance of Kingston Aggregate's existence. Finally, the essential relationship between Foley and Kingston Aggregates is that of contractor and sub-contractor. While this is not unusual of itself where it is alleged that two or more entities are under common control or direction, it is unusual in the absence of any ownership connection or corporate inter-relationship. If the contractor/sub-contractor relationship was the extent of the relationship, then the Board would need to go no further, for, as the Board has observed in its decision issued December 18, 1979 (as yet unreported) in *Metropolitan Auto Parking Inc.*, [1979] OLRB Rep. Dec. 1193, a close economic relationship is implicit in a simple sub-contracting arrangement. A close economic relationship in and of itself, however, does not establish common control or direction of one business by another, just as it does not establish that a contractor which is economically dependent on another is a dependent contractor as defined in Section 1(ga) of the Act. The Board's observation in *Canada Crushed Stone*, [1977] OLRB Rep. Dec. 806, that it had to consider the total character of the business in deciding whether a contractor was more like an employee (and therefore a dependent contractor) or an independent contractor in his relationship with the employer is, by analogy, equally applicable to examining the relationship between Kingston Aggregates and Foley; it is the total character of the relationship that must be considered. What is significant about the relationship between these two companies, besides the nearly total dependence of Kingston Aggregates on Foley, is the total lack of the arms-length relationship which is characteristic of independent businesses contracting together. A number of the arrangements between the two companies could be viewed as enterprising (or at least novel) accommodations between two entrepreneurs if there was otherwise an arms-length relationship. There is nothing intrinsically suspect in Kingston Aggregates not wanting to risk capital investment in its own equipment; in Foley extending generous terms for renting its equipment to Kingston Aggregates; or in Kingston Aggregates borrowing nearly its entire working capital from the company which is the source of 85% of Kingston Aggregate's revenue. But how do these arrangements look in the context of the total relationship? Kingston Sand started getting business from Foley almost coincident with the birth of Mr. Cameron's idea to start a second company and six weeks before he moved to incorporate in the name of Kingston Sand. Within seven months from the idea, Kingston Aggregates had done \$815,000 work of business with Foley, 85% of its total business for the year. Add to this picture the lack of evidence that Kingston Aggregates is capable of being in an arms-length contractor/sub-contractor relationship with Foley; the evidence that there is substantial, functional interdependence between the two companies and the indicia herein of other elements of common control and the economic reality of the relationship emerges as Foley exercising common control over Kingston Aggregates. In fact, one effect of that control is that there is no need for Kingston Aggregates to hold itself out to the public as a

business in the usual manner. While Foley does not have any shareholdings in Kingston Aggregates, directly or beneficially, its providing of 85% of Kingston Aggregate's working capital may be seen, in the context of all the other elements of their relationship, as being the reasonable equivalent of an ownership position.

28. Having regard to all of the evidence and to the total character of the relationship between Foley and Kingston Aggregates, the Board is satisfied that they are carrying on related businesses under common control within the meaning of section 1(4) of the Act. The question now is whether the Board should exercise its discretion under section 1(4) to declare that the two companies constitute one employer for purposes of the Act. One of the significant purposes of section 1(4) is to protect bargaining rights gained by a trade union from being eroded by work being diverted by one means or another from a unionized business to a related, non-unionized one. One of the results of the total relationship between Foley and Kingston Aggregates is that Foley can go on projects as a "union" contractor and through Kingston Aggregates perform work with non-union labour, with no visible indication of Kingston Aggregate's presence on the project. At the same time, it permits Kingston Aggregates to operate under Foley's umbrella and gain access to large jobs which it would not otherwise be able to do. A potential effect of this practice is to erode the bargaining rights of the applicants. The Board does not have evidence before it that such erosion has taken place, although a strong inference exists from the fact that Foley employed an average combined workforce of 15 engineers and labourers in 1979 while Kingston Aggregates had a workforce of some 30 to 55 employees. It is true that similar risk of erosion would result from Foley entering into a bona fide, arms-length relationship with another non-union contractor and section 1(4) could not protect the applicants. The fact is that it is Foley's control of Kingston Aggregates, a firm carrying on related business, which presents the risk of erosion to the applicant's bargaining rights. It is not necessary for there to have been an actual erosion of those rights before the Board exercises its discretion. As the Board stated in *Kustom Insulation Ltd.*, [1979] OLRB Rep. 531,:

"It is not necessary, however, for the union company to fall apart before concluding that an employer's scheme of operating a business through a union and non-union company has undermined a union's bargaining rights."

While the respondents argued that there was no scheme or intent to avoid or dilute the applicants' bargaining rights, it is the reality that erosion has resulted or that there is a risk of erosion of bargaining rights which may cause the Board to exercise its section 1(4) discretion to remedy the situation. In this case, the applicants have acted promptly upon learning of Kingston Aggregate's existence to bring these applications before the Board and the Board concludes that in all the circumstances of this case, it is an appropriate one in which to exercise its discretion and grant a declaration. Accordingly, the Board declares that Donald A. Foley Limited and Kingston Aggregates are one employer for purposes of the Act. Since Kingston Aggregates is the name under which 429185 Ontario Limited trades in business and by virtue of the common ownership, direction and control between Maceron Limited and 429185 Ontario Limited, the Board further declares that Donald A. Foley Limited, 429185 Ontario Limited, operating as Kingston Aggregates and Maceron Limited are to be treated as one employer for purposes of the Act.

DECISION OF BOARD MEMBER, F. W. MURRAY:

1. I dissent.

2. I would not have found that the Respondents were carrying on a related business in common control or direction within the meaning of section 1(4) of the Act.

3. While there is clearly some functional interdependence between the two companies, I would not, particularly in the construction industry and more particularly in this segment of the industry, be moved to declare that the two companies constitute one employer for purposes of the Labour Relations Act in the absence of hard evidence concerning common ownership, either by way of shares, or evidence by way of records as to common directorships.

4. Moreover, I also believe that the Board has erred in failing to exercise its discretion under section 1(4) of the Act and decline to declare the companies to constitute one employer for purposes of the Act. It was open to the Applicant to historically show the numbers employed by Foley in previous years. Foley's business as a general contractor as I understand it would not necessarily generate a large number of employees, particularly when such a large portion of his business was and is the rental of construction machinery across the province. Had there been an erosion or if there was a threat of erosion, it would have been a simple task indeed for the Applicant to have submitted the history of employee members in the area and to show that during 1979 this number had been affected by the employment of 30 to 55 employees of Kingston Aggregate during 1979. In failing to exercise the discretion available to it under section 1(4) of the Act, the Board's decision may well have the effect of extending the bargaining unit to a sub-contractor working at least in part on jobs that otherwise would be "non-union", and the evidence indicates that a great deal of Kingston Aggregate's competition in the area falls in this category.

1360-79-U Toronto Typographical Union No. 91 (ITU), Complainant, v. Goldcraft Printers Ltd., Respondent.

Duty to Bargain in Good Faith – Company refusing Rand formula proposal – Union and company engaging in hard bargaining – Whether violating section 14

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members C.G. Bourne and P.J. O'Keeffe.

APPEARANCES: *James Buller for the applicant; R. Heikkila for the respondent.*

DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN AND BOARD MEMBER C.G. BOURNE; April 16, 1980

1. The name "Goldcraft Printers Limited" appearing in the style of cause of this complaint as the name of the respondent is amended to read: "Goldcraft Printers Ltd."

2. This is a complaint filed under section 79 of *The Labour Relations Act* alleging a

breach of the section 14 duty to bargain in good faith and make every reasonable effort to conclude a collective agreement. The complaint was filed on October 17, 1979. The complaint alleges that the company adopted a hostile and contemptuous attitude to the union's proposals from the outset of bargaining and on July 25, 1979, the first day of bargaining, referred to these proposals as "garbage". The complaint alleges that the company refused to bargain seriously or reasonably on the union's proposals or offer anything resembling a full counter proposal even though the parties were in the "open period" on October 12, 1979. The complaint further alleges that the company has attempted to deal directly with its employees behind the union's back. In a letter to the Board dated December 7, 1979 the complaint was enlarged to encompass allegations that the company had attempted to nullify the Board's description of the bargaining unit, had denied bindery employees wage increases and had in fact "tabled wage rates much lower than rates currently paid at Goldcraft which are much lower than current industry wide rates", had totally refused to bargain on union security, and had worsened its wage offer by tabling a second year wage increase "so small to be tailor-made for union and employee rejection." In addition, the complaint refers to the refusal of the company to allow employee negotiators to attend negotiations during working hours.

3. The complainant trade union was certified by decision of this Board dated June 28, 1979. The certification was uncontested. There were no charges or employee petitions and the parties agreed on the description of the bargaining unit. The Board accepted the agreement of the parties in respect of the bargaining unit even though the unit was not described in terms of either all employees or in terms of a craft. The Board certified the complainant as bargaining agent for all production employees of the company engaged in offset preparatory work, press work and bindery work save and except non-working foremen and persons above the rank of non-working foremen. The Board usually refuses to certify in terms of work classifications because subsequent disagreements between the parties as to who falls within these classifications can occur. The bargaining which followed between these parties is a case in point.

4. In a decision dated November 6, 1979 the Board found that the respondent company terminated Mr. Frank O'Grady, a bargaining unit employee, on or about August 30 1979 in violation of the Act.

5. The parties to this matter commenced negotiations on July 25, 1979. The union filed with the company a copy of a master agreement between Council of Printing Industries of Canada and The Toronto Typographical Union No. 91. The master agreement, with minimal modification, served as the union's initial demands. Mr. R.E. Heikkila, the company's counsel who served as its negotiator, testified that in many areas the master agreement filed with the company did not relate to the company's operation and for this reason he described the union's proposals as "garbage". He adopted the usual negotiating approach of seeking clarification from the trade union on the meaning of each of its proposals and dealing with non-monetary items before monetary. After four hours of discussion on July 25th (the first meeting of the negotiation of a first agreement) the trade union threatened to apply for conciliation. Mr. Heikkila in turn threatened to file a section 14 complaint and the trade union agreed to meet the company again on August 7th. The union, however, without further consultation with the company, applied for conciliation on August 1, 1979.

6. Conciliation was granted over the objection by the company and the first meeting

was scheduled for September 12, 1979. The negotiations broke down very quickly over the issue of union security. The union was demanding a closed shop arrangement with a union hiring hall. The company took the position that it would not agree to hiring through the union office and would not agree to union membership as a condition of employment. The union asked for a "no board" report. The conciliation officer reported to the Minister of Labour that he had been unable to assist the parties in reaching a collective agreement and on September 24, 1979 the Minister advised the parties that he would not be appointing a Board of Conciliation. The parties, therefore, were legally entitled to strike or lock out on October 11, 1979; sixteen days following the release of the Minister's letter. As of September 24th, however, the parties had discussed few of the non-monetary issues and none of the monetary items which were in dispute.

7. The parties met in the presence of a mediator on October 9th and 12th. The company tabled its first written counter proposal on October 9th rejecting the language proposed by the union on all but duration of agreement, Notice to Amend or Terminate, Health and Safety and portions of the language proposed by the union in respect of the grievance procedure, arbitration and the No strike/No lockout clause. The company's proposal referred to Articles 12 through 28 (wages, benefits, hours of work and dues check off) as matters "to be discussed on Tuesday." The parties resolved the grievance and arbitration language and the No strike/lockout language on October 9th. The issue of union recognition was focused in this meeting as well. The union's initial proposal of July 25th, 1979 had defined the scope of the union's recognition as including "all offset preparatory work, including pastemakeup, film assembly/stripping, camera operations, platemaking, presswork, coating, bindery work and finishing." The company's October 9th counter proposal defined the unit in terms of "all production employees engaged in offset preparatory work, presswork and bindery work" as it is defined in the Board's certificate but in addition sought to exclude "persons regularly employed for not more than 24 hours per week, casual employees, relief employees, temporary employees and students employed for their vacation." None of these exclusions appear in the Board's certificate. The company took the position that the union was attempting to expand its recognition while the union accused the company of attempting to restrict its recognition.

8. The parties met again on October 12th, the second day as of which resort to strike or lockout was legal. The meeting quickly floundered on the issue of union security. The demand for a union shop, as included in the union's initial proposal, had not been modified. The company, on the other hand, had taken the position on October 9th that "employees shall be free to join the union." The evidence establishes that shortly after the commencement of the meeting on October 12th, Mr. Earl, the International Representative, advised the company "if you are not prepared to talk about union shop you are wasting your time and might as well go home." The meeting broke off at this point. The instant complaint was filed by the union five days later.

9. The parties met again on October 22nd. The union softened its position on union security to the extent of seeking a maintenance of membership for present employees who are members and the requirement for all other employees, existing and future, to pay the equivalent of union dues by payroll deduction as a condition of employment; in essence a Rand formula with maintenance of membership for existing members. The company replied by proposing that union membership be a matter of individual choice for each employee and committing Goldcraft to deduct union dues from employees as provided under section 36(a) of *The Labour Relations Act*.

10. The first hearing in this matter was held on November 16, 1979. After entertaining opening submissions and hearing evidence from the first union witness, the Board advised the parties to return to the bargaining table. The parties met in the presence of a mediator on November 23rd but returned for continuation of hearing on January 10, 1980. The parties met again in the presence of a mediator on February 4th but again returned for continuation of hearing before the Board on February 5th and February 11th. The labour and management representatives on the Board panel assigned to the case attempted to assist the parties to resolve their bargaining impasse on February 5th. They were unsuccessful and the hearing in this matter concluded on February 11th.

11. During the course of bargaining following the commencement of hearing in this matter the issue of union recognition took on an added dimension. During this period the company provided the union with data in respect of the wage rates being paid to bargaining unit employees and tabled a wage offer. The union replied that the names of six of the thirteen bargaining unit employees were not shown. The company argued that none of these six performed work within the union's recognition. The company, however, had included their names on the list of employees falling within the bargaining unit which it had submitted with its reply to the union's application for certification.

12. However, the parties settled the issue of union recognition on February 5th so that prior to completion of the hearing in this matter only four issues remained in dispute between them. These issues are vacations with pay, wages, term and union security. All of the other matters to be included in their first collective agreement have been agreed.

The issue between the parties with respect to vacations relates to the service requirement for three weeks vacation. The company is proposing three weeks vacation after seven years of service while the union's position is three weeks vacation after five years of service. Clearly, the more difficult issues between the parties are wages and union security.

13. The company's wage offer will result in wage increases for only two of the bargaining unit employees and provides for hiring rates which are well below the existing rate structure within the plant. The company proposed that it be allowed to pay new hires at these lower rates for up to two years to allow employees to work into their jobs. The union proposed that a helper classification be established instead. The employees who would not receive wage increases on the signing of the agreement if the company's proposal were to be accepted would maintain their existing rates. The company proposed that all rates be increased a further 31¢ per hour effective October 1, 1980 for the second year of the agreement. The company's total wage offer, however, must be considered in light of the increases which were put into effect in December, 1979. The company, although in open period and legally free to alter terms and conditions of employment, sought and received the union's permission to institute wage increases as of November 27, 1979. The letter from the union giving its permission over the signature of Mr. Buller, the local president reads:

"Although several employees of Goldcraft Printers Ltd., were offered no wage increases in the company's offer received on November 22, 1979, the Union hereby grants official written permission to institute all wage increases offered to take effect forthwith.

The union is prepared and desirous of negotiating further wage im-

provements for all production employees, including the bindery employees.

Please advise by return mail your agreement to live up to your written offer, even though incomplete at this time.”

In response the company provided its bargaining unit employees with wage increases ranging from forty cents per hour to one dollar per hour. The company’s wage proposal incorporates these increases and provides additional increases for two bargaining unit employees. No other term or conditions of employment has been unilaterally altered by the company.

14. The union seeks union security in the form of a maintenance of membership for existing members and a Rand formula check-off for all other employees; that is the payment to the union by payroll deduction of an amount equal to monthly union dues. The company, on the other hand, has offered to deduct union dues from the wages of employees who signify in writing that they wish union dues deducted from their wages and forwarded to the union. This is the type of union security provided for in Section 36(a) of the Act. The company’s proposal, as amended on February 5, 1980, goes beyond the “statutory minimum” to the extent that it provides that “once an employee has signified in writing that he wishes union dues to be deducted from his pay and forwarded to the union, his dues deduction will be maintained.”

15. Mr. R. Heikkila, who served as spokesman for the company at the bargaining table and counsel to the company in this matter, testified on behalf of the company. He was asked in cross-examination if he had told the union negotiators early in negotiations that union security would not be a problem. He admitted that he had. He explained that he had spoken with Mr. Goldberg, the managing director of the company, in terms of Rand formula “being a viable way out if you are being hurt economically and require an alternative to hiring through the union.” He testified that having had these discussions with Mr. Goldberg he did not hesitate to intimate to the union that if everything else fell into place union security should not be a problem. He testified that the company later reassessed its thinking with respect to union security and came to the conclusion that it should not commit its employees to paying the equivalent of monthly union dues to this union. He referred to the turnover of employees since the union was certified and the union’s conduct during negotiations as causing the reassessment.

16. Mr. J. Schoenherr, a bargaining unit paper cutter employed by the company, was called by the union to testify in this matter. He admitted in cross-examination that Mr. Buller, the union president had suggested to the employees of Goldcraft in August or September (well before the parties were in a position to legally strike or lockout) that “if they slowed down production they might get an agreement faster.” Mr. Schoenherr testified that he had not slowed down his production but had no knowledge of whether or not other employees had slowed down. Mr. Heikkila testified that production did slow down during this period. Mr. Schoenherr also admitted that the union’s International Representative had discussed the possibility of picketing the house of Mr. Goldberg’s mother. She is employed by the company answering the telephone. Mr. Goldberg’s mother’s house was never picketed by members of the complainant trade union. The company, however, was aware that these discussions had taken place. Mr. Schoenherr further admitted that Mr. Buller had discussed with Goldcraft employees the advisability of calling Goldcraft’s customers to inform them of

the labour dispute and the possibility of a strike. These discussions took place in September and early October and the evidence establishes that Mr. Buller contacted customers of Goldcraft shortly thereafter. The company has subsequently taken an action against Mr. Buller for slander. Finally, the evidence establishes that Health Inspectors visited the plant on three or four occasions during the Fall. The plant had never previously been visited by Health Inspectors and the company is of the view that their visits were solicited by the union as a form of harassment.

17. The union argues that it made a number of major concessions in order to attain a minimal settlement compared to the industry pattern and is now faced with a company position "tailor-made for rejection." The union maintains that if it accepts a contract without at least a Rand formula check-off it will be paving the way for its own destruction. The union asks the Board to consider the company's position on union security in light of Mr. Heikkila's evidence that the company had put its mind to the issue and decided that it could live with a Rand formula check-off. The union asks the Board to consider this fact along with the quantum of the company's wage offer and conclude that the company's offer was designed to prevent ratification. The union argues that a wage offer which provides increases for only two employees on the signing of the agreement and then provides no more than an additional 31¢ per hour across the Board next October is bound to turn employees off. The union asks the Board to weigh the evidence before it in the context of a small bargaining unit where the strike weapon is very fragile because of the ease with which the employer can engage in strike-breaking activities and conclude that the company's bargaining position is part of a continuing scheme to undermine the trade union. The union justified its decision to contact the company's customers as a legitimate means of applying pressure on the company. The union seeks the imposition of a collective agreement as a remedy to the alleged breach of section 14.

18. The company maintains that its offer is reasonable on all counts. The company argues that the wage increases which it granted in December with permission of the trade union must be considered as part of the overall package as must be the second year across the board increase of 31¢ per hour. The company argues that in the circumstances of this case it was justified in reassessing its position on union security and taking a harder line than it had originally intended. The company characterizes the recognition issue, which has now been settled, as a "non issue". The company disputes as a general proposition that the strike weapon is a fragile one in the hands of a small unit citing the risks faced by a small employer if his business is struck. The company argues that collective bargaining as established under the Act is an adversarial process with the parties allowed to pursue their individual self-interest. The company cites the *Ottawa Citizen* case, [1979] OLRB Rep. Oct. 967, *Pine Ridge Nursing Home*, [1977] OLRB Rep. Feb. 65 and *Daily Times*, [1978] OLRB Rep. July 604 in support of this argument. The company takes the position that if the union does not have the leverage to get what it wants in this case it should take the collective agreement offered by the company.

19. Section 14 of the Act provides:

"The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement."

The Board has found that the duty operates on two levels. It operates to buttress the employer's recognition of the trade union as the exclusive bargaining agent of all bargaining unit employees. The duty also operates to preserve and maintain the decision-making framework which is essential to meaningful collective bargaining. The Board has found that this second aspect of the duty requires an employer to provide the union with data necessary to its bargaining capability, to engage in full and open discussion on all matters in dispute and to refrain from tactics which upset or destroy the decision-making framework.

20. At the recognition level the duty ensures that at the very least the parties share the common objective of concluding a collective agreement. The Board, however, has been careful in its jurisprudence to emphasize the principle of voluntarism which underpins the collective bargaining process. The parties must intend to enter into a collective agreement but the content of that agreement is to be determined by the parties themselves through the process of negotiation and if necessary, negotiation assisted by economic sanction. The Board aptly summarized the extent of the duty in the *Ottawa Journal* case [1977] OLRB Rep. Nov. 748 wherein at paragraph 12 the Board stated:

"The duty to bargain in good faith is administered by this Board in such a way as to improve and facilitate the practice and procedure of collective bargaining. This approach recognizes, however, that the results of collective bargaining are necessarily dictated by the relative economic strength of the bargaining parties. Although the Board should make every effort to restore a bargaining relationship and re-establish the dialogue between the parties to that relationship, it should not go so far as to redress any imbalance of bargaining power that might exist in a particular bargaining situation."

(See also *The Daily Times of Brampton* case, *supra*, and *Fashion Craft Kitchens*, [1979] OLRB Rep. Oct. 967.) The Board does not regulate the content of collective agreements. In appropriate circumstances, however, the Board will draw an adverse inference with respect to the intent of a party to enter into a collective agreement if it persists in tabling patently unreasonable proposals.

21. In the recent *Radio Shack* decision, [1979] OLRB Rep, Dec. 1220, the Board dealt specifically with the need for circumspection in first agreement situations; especially those in which the employer has committed unfair labour practices in an effort to stem the union's organizing. The Board put its mind to the difficulties presented in assessing bargaining behaviour in first agreement situations at paragraph 74 of that decision and stated:

"In discussing the nature of the bargaining duty, we voted the difficulty of distinguishing hard bargaining from conduct which is more in the nature of 'going through the motions', and lacking any real intention of signing an agreement – 'surface bargaining' if you will. Experience has taught this Board that it must be particularly sensitive to this distinction in first contract situations. Few employers willingly embrace collective bargaining, but most accept the right of the employees to participate in that process and negotiate first agreements with duly certified bargaining agents without rancor or controversy. This, of course, does not mean that all first agreement controversy is a product of anti-union ani-

mus or that good faith bargaining in first agreement situations must always end in a contract. Neither proposition would be true The Board should not conclude lightly that an employer is merely engaging in hard bargaining in such situations or that it is exercising its freedom of speech in communicating directly with bargaining unit employees. The nuances of each case must be considered and earlier employer unlawful conduct may trigger a detailed assessment of bargaining activity. The legitimate concern for 'freedom of contract' or 'freedom of speech' ought not to blind the Board to abuses committed under either banner, and that strike at other equally fundamental tenets of the legislation."

While the principle of voluntarism is fundamental to the collective bargaining process the Board must not be blinded by it in critically assessing what is portrayed as hard bargaining. This is especially so in first agreement situations where an employer who maintains he is engaging in hard bargaining has previously attempted to upset the union's organizing efforts by unlawful means.

22. This is not a case where the employer has conducted himself in a manner which has upset or undermined the decision-making capabilities of the other side. The employer has engaged in a full and open discussion of all matters in dispute. Indeed, with the exception of four issues, all of the other matters which will comprise the parties' first agreement have been negotiated. It was the union which broke off direct negotiations at the outset after only four hours of discussion and sought a "no board" report after a single conciliation meeting. In the circumstances, the union cannot be heard to complain that the employer had failed to table a full counter proposal prior to the expiration of the conciliation process. The company followed the usual bargaining practice of seeking clarification from the union and then attempting to resolve non-monetary issues before tackling the monetary issues. The company's approach in this regard is the same as that followed by employers and trade unions generally in the negotiation of a collective agreement. Again it is not unusual for a small employer to meet with his employees in bargaining after working hours, especially where it is anticipated that a number of meetings will be required as in most first agreement negotiations. We attribute Mr. Heikkila's reference to the union's bargaining proposals as "garbage" to the emotion of the moment. Mr. Heikkila was concerned and upset that the union's initial proposals had been taken in large part from the Toronto Typographical Master Agreement. His spur of the moment comment cannot be construed as an act of bad faith. The company attended a series of meetings with the union and the progress that was made over time evidences the fullness of the discussion. If the union is going to succeed in this matter it must establish that the company through its bargaining strategy is attempting to avoid a collective agreement.

23. When considered in isolation the company's last offer for a first agreement, including all matters agreed between the parties, is not so patently unreasonable as would suggest that the employer is not interested or not prepared to enter into a collective agreement. The increases given to employees in December with the permission of the trade union must be considered as part of the employer's wage proposal. The employer's position on union security is slightly better than the statutory minimum. This is a first agreement bargaining situation, however, in which the employer was found to have terminated the employment of an employee member of the union's bargaining committee, in part at least, for anti-union reasons. Accordingly, the Board must take a broad look at all the evidence in order to deter-

mine if the firm position taken by the company, especially in respect of union security, evidences a desire on the company's part to avoid a collective agreement.

24. The difficult and unique aspect of this case is the evidence of Mr. Heikkila that early in the negotiations he intimated to the union that if everything fell into place union security would not be a problem and his admission that at the time he and his client were considering Rand formula as an acceptable form of union security. The company later changed its mind and is now committed to be a voluntary dues deduction arrangement with a maintenance aspect to it. The union did not challenge Mr. Heikkila's evidence on this point. Indeed, the union relies on it. This evidence, however, cuts two ways. On the one hand it satisfies the Board that at the time Mr. Heikkila and his client came to the conclusion that the Rand formula was an acceptable form of union security the company was thinking in terms of entering into a collective agreement. The company's decision to seek union permission to institute wage increases during the open period is supportive of this conclusion as well. This evidence, therefore, blunts the inference which might otherwise be drawn from the unfair labour practice finding against the company. On the other hand, however, Mr. Heikkila's evidence establishes that the company recognized that union security in the form of Rand formula would provide a resolution to an issue central to the negotiation of a first agreement. Notwithstanding its recognition of this fact the company changed its mind and is now taking a firm position which is unacceptable to the trade union. The company explains its change of mind by reference to the union's conduct during bargaining and its employee turnover. The Board, however, must decide if the company's change of mind represents a decision on its part that it is no longer prepared to enter into a collective agreement with the union. Regardless of the behaviour of the trade union and its impact on the relationship between the parties the company is required to maintain its intent to enter into a collective agreement. This is not to say, however that a company faced with union pressure tactics cannot seek relief under the Act where the tactics are viewed as unlawful or alter its bargaining expectations in response.

25. There is no doubt that the union in this case has attempted to put pressure on the company by economic and other means. Mr. Buller suggested to the company's employees that a slow-down of production might accelerate negotiations. He justified his contact with the customers of the company on the basis of applying pressure. The International Representative discussed the possibility of picketing Mr. Goldberg's mother's residence. Clearly, he did so because of its potential impact on Mr. Goldberg. The company was of the view that the series of visits by Health Inspectors constituted another attempt by the union to apply pressure. Similarly, the union's decision to break off direct negotiation after 4 hours, to break off conciliation after a single meeting and to request a no-board report at the earliest possible date must also be viewed as a union attempt to apply additional pressure. A union which seeks to apply pressure in these ways is not immune from adverse employer reaction so long as that reaction does not take the form of a breach of the duty to bargain.

26. This Board has long held that hard bargaining and firm positions do not constitute a breach of the duty to bargain. In the absence of anything approaching the pattern of unlawful activity which existed in the *Radio Shack* case, *supra*, (as allowed the Board to find that the position advanced by the company in respect of union security constituted a continuation of that pattern), in the face of evidence which establishes that early in the negotiations the company was prepared to offer a form of check-off acceptable to the trade union, and having regard to the methods adopted by the trade union to apply pressure, we are not

satisfied on the balance of probabilities that this company is attempting to undermine the trade union. In our view, the position presently taken by the company at the bargaining table is a firm but legitimate response to the union's bargaining tactics.

27. We have not been influenced in our conclusion by the union's argument that the strike weapon is a fragile one in a small bargaining unit situation. Its effectiveness in any bargaining situation will depend upon a range of factors exclusive of the size of the bargaining unit. The company has proposed terms of settlement on all matters in dispute. The union may not consider the package offered by the company to be an acceptable one. Union acceptability, however, is not the test in deciding if an employer is bargaining within the section 14 duty. We reiterate that on the balance of probabilities we are satisfied that this company is bargaining within the requirements of its section 14 duty.

28. Having regard to all of the foregoing, this complaint is hereby dismissed.

DECISION OF BOARD MEMBER P.J. O'KEEFFE:

1. I dissent.

2. No matter how many legalese phrases or borrowings we might take from past allegedly profound decisions of this Board dealing with previous like situations and cases of this kind, the one real blunt fact of life from the evidence in this case is that this respondent employer does not want to be saddled by either a union or a collective agreement in its relationships with its employees.

3. The evidence in clear and simple broad daylight, not shrouded or clouded by relevancies as determined by rules of evidence, legal jargon, balance of probabilities and such other high sounding complex phrases and legalese academic reasonings is an all too familiar story of legal gamesmanship by employers skilled in the art of destroying the union "game" in the industrial relations jungle.

4. The evidence is clear that from the beginning the respondent employer rebuffed the peaceful negotiating overtures of the union representatives when they approached him after they had signed up the employees and prior to certification.

5. In reply to the union's application for certification, the respondent company, in an industrial relations sophisticated legal manouever, agreed to the union's proposed bargaining unit which was a unit of 13 employees. The sophistication of this legal manouever is that it puts the applicant union initially in the position where it must produce evidence of membership in its union of the required maximum statutory super majority to gain certification.

6. The union's membership evidence met this first obstacle requirement. The reason I use the words "legal manouever" in the above context is that the evidence discloses that by the time the union got to the bargaining table the employer was only willing to go through the charade of bargaining for a unit of six employees. Apart from other matters in dispute the respondent employer arbitrarily and in a demonstrated show of bad faith reneged from the agreed on bargaining unit description and introduced the fundamental undermining issue of the extent of the union's statutory bargaining rights. This issue was guaranteed to put the union in a position that they had to struggle all over again for the basic ingredient of any

good faith bargaining foundation which was the very acceptance of the union as the bargaining agent.

7. On the commencement of bargaining on July 25, 1979, the union proposed as a basis for negotiations a modified draft agreement based on a master agreement between the Council of Printing Industries of Canada and The Typographical Union No. 91. This proposed agreement is geared to this particular industry, and is an agreement agreed to and in effect for 26 employers in this industry in Metropolitan Toronto, who are signatories to the agreement, and for an additional 16 employers in Metropolitan Toronto who, while not signatories to the master agreement, are nevertheless bound by its terms. The respondent employer's description of this modified master agreement put forward by the union as "garbage" is a fighting adversarial word, again guaranteed to set the stage for conflict and demonstrated bad faith.

8. Most of the relevant evidence in this proceeding is outlined in the majority decision and need not be repeated. However, it is worthy of note to relate that the first union bargaining committee consisted of the assigned full-time representatives of the union together with two rank and file employee bargaining representatives, Mr. Ron Matthews and Mr. Frank O'Grady. Both of these employees were the subject of a union complaint filed under section 79 of the Act in which the union alleged that Mr. Ron Matthews had been subjected to verbal threats of discharge by the respondent company contrary to the Act. The union also alleged that the second rank and file employee member of the bargaining committee, Mr. Frank O'Grady, was terminated by the respondent company contrary to the provisions of *The Labour Relations Act*. The Board in its decision dismissed the union's complaint as it related to Mr. Matthews and upheld the union's complaint with respect to Mr. O'Grady. In that decision, Board file 1029-79-U dated November 6, 1979, the Board stated the following:

"Mr. O'Grady is a visible trade union supporter who is a member of the complainant union's bargaining committee. The parties have yet to conclude a first collective agreement and hence their relationship has yet to be formalized. In this setting the termination of an employee member of the union's bargaining committee is an event of some significance. The Board has reviewed the evidence before it in support of the company's contention that he was terminated because of the poor quality of his work but has not been satisfied that Mr. O'Grady was terminated solely for this reason. Having regard to his trade union activity, to the timing of his termination and to the quality of the company's evidence vis-a-vis his work as reviewed in paragraph 14 herein, the Board hereby finds that Mr. O'Grady was terminated in contravention of the Act and orders that he be reinstated forthwith with compensation for his lost wages."

9. As correctly stated by the Board above, the termination of an employee member of the union's bargaining committee is an event of some significance, particularly when such event is clearly unlawful and contrary to the Ontario *Labour Relations Act*. The event become even more significant in light of the present complaint before the Board and the evidence before us that Mr. O'Grady never did return to the employment of the respondent company but made a financial settlement in lieu of returning to work. Needless to say, he

never returned to the bargaining table again. The only further evidence we received respecting Mr. Matthews is that he quit his employment with the company and his position on the union's bargaining committee.

10. The respondent employer's interference with rank and file employees continued to October 12, 1979, five days prior to the filing of this complaint. The evidence discloses that the employer's counsel, who also wore the negotiator's hat, as well as an adversarial professional, demanded to have the names of the employee observers who were in attendance at the mediation meeting on that date. The tone of this demanding request for names was, in my view, intimidation of the grossest kind.

11. It was this hostile management climate that gave rise to the instant complaint. During the protracted Board hearing in this matter the parties, with the encouragement of this Board, met with a view to arriving at a settlement of the items in dispute. We are not privy to all of the of such bargaining but it is quite clear from our first-hand knowledge of the employer's response to the sensitive union security issue that the union will not receive a reasonable agreement from this respondent company.

12. Faced with the foregoing, we must fashion a remedy in accordance with our statutory obligations. To walk away from this bitter dispute by dismissing the union's complaint and buying the respondent company's argument respecting the sacred cow adversarial process as enshrined according to the company's argument in the *Ottawa Citizen* case, [1979] OLRB Rep. Oct. 967, *Pine Ridge Nursing Home*, [1977] OLRB Rep. Feb. 65 and *Daily Times*, [1978] OLRB Rep. July 604, is tantamount to leaving the unfortunate employees tied hand and foot to the company's gate at the sacred cow adversarial mercies of this already convicted union activist firing employer.

13. I reject the glories of the adversarial philosophy in the matter of labour relations. Industrial labour relations, in my view, in accordance with my statutory obligations as a member of The Ontario Labour Relations Board, is a sensitive human people problem touching on the lives of little people who happen to be employees of an employer. In the instant case we are dealing with the employee problems of approximately 13 employees, the majority of whom have freely indicated by their membership evidence that they want a union to represent them in their relations with their employer. Despite all of our great scientific and human progress in the 1980's, these few employees are just attempting to move out of the master-servant relationship of times well past and are attempting to assert their rights as provided for them in progressive labour legislation. They have come to believe that the *Ontario Labour Relations Act* and its administrative arm The Ontario Labour Relations Board can provide them with the protection to freely join the union of their choice and assist them in giving them a say in their day-by-day relationships with their employer by freely negotiating a collective agreement that will regulate their working lives with the employer. A collective agreement to them represents a worker's bill of rights on the job and will give them a reasonable say and rewards in their working relationships with their employer. They are not attuned to the jungle philosophy of legal education in our society that glories in adversarial postures. They are not conditioned by our civilized society or our layman education to perform as gladiators in a Roman sporting ring. Adversary legal postures that have to establish that a rape victim is somehow a whore asking for the misfortune that befell her to establish the legal truth of a matter are legal academic manouvers foreign to the civilized lay person. They believe, as I do, that when the *Ontario Labour Relations Act* speaks in its

preamble to further harmonious relations that it means just that – responsible civilized endeavour not resorting or glorifying its opposite which is adversarial gladiator endeavours.

14. The majority decision make much of the repugnant suggestion of the picketing of the home of Mr. Goldberg's mother. This piece of "damaging" evidence was led in cross-examination by Counsel for the respondent; the "damaging" evidence was in fact no stronger than that this distasteful suggestion was never more than a discussed possibility that was part of a general discussion respecting what the union might do to cope with the bad faith tactics of the employer. The union cannot be made out to be a "heavy" because of this random suggested possibility. The facts are that this possible resource was never acted on and in fact was rejected by the employees. The evidence of the union's conduct in this matter is one of a frustrated bargaining agent that sought every lawful means to have the unlawfully dismissed employee reinstated and recourse to bring every lawful influential persuasion on this errant employer to arrive at an agreement. As I see my obligation as a member of the Board in accordance with the statutes governing my decision, I am particularly mindful that the preamble of the *Ontario Labour Relations Act* provides as follows:

"WHEREAS it is in the public interest of the Province of Ontario to further harmonious relations between employers and employees by encouraging the practice and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees."

Section 8 of *The Interpretation Act* provides that:

"The preamble of an Act shall be deemed a part thereof and is intended to assist in explaining the purport and object of the Act."

Further, section 10 of *The Interpretation Act* provides:

"Every Act shall be deemed to be remedial whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

15. Obligated by the foregoing, and in accordance with the remedial powers of this Board given to it by the *Ontario Labour Relations Act* to give real meaning to the intent, meaning and spirit of the Act, I would order that the parties meet forthwith with Ministry of Labour Mediator Mr. Fraser Kean to negotiate and enter into a collective agreement. Failing agreement between the parties on a voluntary negotiated agreement, I would order that Mr. Fraser Kean draft a collective agreement for the parties that would be final and binding on the parties for a term of not more than one year from the submitted date of the draft agreement which shall be completed not more than sixty days from release of this decision. In the event that Mr. Fraser Kean is unable to act as a mediator-arbitrator in this matter, the Board will remain seized of this matter for the purpose of appointing a mediator-arbitrator to carry out the remedial provisions of this decision.

1780-79-R Office & Professional Employees Internation Union, Applicant, v. **London District Crippled Children's Treatment Centre**, Respondent, v. Group of Employees, Objectors.

Representation Vote – Eligibility to vote – Whether employee who has given notice of quitting day before vote eligible – Whether vote set aside

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *Gilles Beauregard for the applicant; Danial R. Ross and J. O. Evans for the respondent; Jane Lavender, Debbie Langford and Gareth Parry for the objectors.*

DECISION OF THE BOARD; April 28, 1980

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2. This is an application for certification in which an issue has arisen respecting the entitlement of an employee to cast a ballot in a representation vote ordered by the Board.

3. The application was filed on December 13, 1979. On January 11, 1980 the Board issued a decision in which it found that not less than forty-five per cent of the employees of the respondent in the bargaining unit were members of the applicant for the purposes of this application. The Board therefore ordered a representation vote to be taken of the employees in the bargaining unit. Through the Board's Labour Relations Officer the parties agreed to the composition of the bargaining unit and the list of eligible votes on January 8, 1980. Following its normal practice in ordering the taking of the representation vote the Board stated:

“All employees of the respondent in the bargaining unit employed on January 8, 1980 who do not voluntarily terminate their employment or who are not discharged for cause between January 8, 1980 and the date the vote is taken will be eligible to vote.”

4. The representation vote was taken on January 22, 1980. On January 21, 1980 Miss Ingrid Cereghini, an employee in the voting constituency, gave written notice to the respondent that she was terminating her employment at the conclusion of her working day on January 23, 1980. Miss Cereghini presented herself at the polling station and voted in the representation vote on January 22, 1980. It is common ground that the scrutineer for the employer then expressed a concern to the Board's Returning Officer respecting her eligibility to vote. No formal objection was made, however, nor did the employer request that her ballot be segregated and not counted pending a determination of that issue by the Board. While the union had a scrutineer present, there was no scrutineer at the polling station representing the group of employees who had appeared at the initial hearing as objectors to the application.

5. At the conclusion of the balloting the representatives of the applicant and the respondent agreed to an immediate counting of the ballots. Prior to the ballots being counted both representatives signed the Board's "Consent and Waiver" form which states:

“We the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on 22nd day of January, 1980.

And we hereby waive any objections as to the regularity and sufficiency of the balloting.”

6. The ballot count disclosed a victory for the union. Of the 21 ballots cast, 11 were marked in favour of the applicant and 10 were marked against it.

7. By letter dated January 23, 1980 a group of employees, largely the same employees who had appeared as objectors at the hearing, requested that a second vote be taken. They submit that since the vote was won by a one-ballot margin and Miss Cereghini was voting in circumstances where she was to leave the bargaining unit, the results of the vote should not be allowed to stand.

8. By letter dated January 28, 1980 counsel for the respondent raised substantially the same objection.

9. A hearing was therefore convened to allow the parties to make their representations respecting the result of the vote. The twofold issue is whether Miss Cereghini was entitled to vote and whether the outcome of the balloting should be allowed to stand in all of the circumstances.

10. Normally the Board might have some reservations about the standing of the employer to object either to the eligibility of Miss Cereghini to vote or to the validity of the outcome. The employer failed to raise any formal objection at the time that she cast a ballot. It subsequently signed a Consent and Waiver form which is on its very face an implicit undertaking to be bound by the result of the vote. If the respondent were the only party objecting there would be a serious question about its ability to do so. (See, *Salvation Army Grace Hospital* [1965] OLRB Rep. Nov. 539.) Because, however, a group of employees has raised the same objection, the employer, as a party, must be given the right to participate fully in the hearing of the employees' application by the Board. The Board therefore allowed the respondent to make all of its own representations on the issues before it and in the result both the employer and the employees were given a full hearing on the merits of their objections.

11. It is clear that the employees have a right to object to any matter relating to the representation vote after it has been taken and the report of the Board's Returning Officer has issued. In this regard section 45(1) of the Board's Rules of Procedure provides as follows:

“Subject to subsection 3, where a representation vote is taken after the hearing of an application,

(a) a party; or

(b) any employee or representative of a group of employees,

who desires to make representations to any matter relating to the repre-

sentation vote, or as to the accuracy of the report of the returning officer, or as to the conclusions the Board should reach in view of the report, shall file a statement of desire as prescribed in Form 43 or 45, as the case may be, on or before the last day for the posting of the copies of the report and notices under subsection 3 of section 44.”

12. We deal firstly with whether Miss Cereghini was entitled to vote. On this question, given the wording of the Board’s order, there can be little doubt. There is an obvious difference between notice of an intention to terminate one’s employment and actual termination. On the day of the vote Miss Cereghini was an employee at work in the bargaining unit. She did not terminate her employment until the end of the following day. It cannot be seriously contended that Miss Cereghini was not entitled to vote according to the plain wording of the Board’s order. On the day of the vote she was an employee in the bargaining unit as of January 8, 1980 who had neither been discharged nor voluntarily terminated her employment.

13. The more substantial issue is whether in these circumstances the result of the vote should be allowed to stand. Counsel for the respondent made two submissions in this regard. First he maintains that the employee’s notice of her intention to terminate her employment is in the nature of an irrevocable document which should foreclose her right to influence the outcome of the representation vote. Secondly, he argues that, apart from her intention, because her interest in the bargaining unit ended on the day after the vote her ballot should not be allowed to influence the outcome.

14. There is, of course, no evidence before the Board to indicate which way Miss Cereghini marked her secret ballot. Nor should this Board give any credence to the assumption implicit in the employees’ representations that conducting a second vote without her participation would alter the outcome. The secrecy of the ballot and the clear legislative intention to safeguard the wishes of individual employees enjoins the Board and the parties before it from engaging in that kind of speculation.

15. Certification is the primary process in *The Labour Relations Act*. It is the means by which the wishes of employees for representation are transformed into the affirmative right of a union to bargain collectively on their behalf with their employer. Generally, apart from exceptional cases involving extreme unfair labour practices, certification is accomplished by an application of majoritarian principles. A union can be certified by demonstrating support in excess of 55% of the bargaining unit through membership cards. It can also be certified by obtaining a simple majority of the ballots cast in a representation vote. These are the two normal routes to certification under the Act. Both of these procedures require the application of percentages to a defined number of employees. Because employees may continuously come and go through hiring, lay-offs, leaves of absence, quitting and discharge, the Board has had to devise some general rules to apply in order to fix a clear and stable figure of employees in a given bargaining unit for the purposes of an application for certification.

16. There are a number of ready illustrations of those rules. The Board has devised, for example, a “terminal date” as a cut off point for assessing the number of membership cards filed by a union and statements in opposition to certification filed by employees. The Board refers to the date that an application is filed for assessing the number of employees in

the bargaining unit. (See *R. v. OLRB, Ex parte Hannigan*, [1967] 2 O.R. 469 (C.A.)). And it has developed a “thirty day rule” to determine whether an employee absent on the date of application is to be counted within the bargaining unit for the purposes of the application (*Amplifone Canada Ltd.*, [1967] OLRB Rep. Dec. 840). The Board has also evolved “a seven week rule” as a rule of thumb to assess which employees will be viewed as full-time and which as part-time for the purposes of an application. (*Sydenham District Hospital*, [1967] OLRB Rep. May 135). These are procedural constructs whose application may mean victory or defeat for either party in any particular application. If all of the lines established by these rules were to be redrawn on a case by case basis the certification process would come to a standstill. These established principles are known to the labour relations community and parties coming before the Board can plan on the basis of them. While none of the above rules are entirely inflexible, there is a substantial onus on any party who seeks to have the Board depart from them in a particular case. (*Trenton Memorial Hospital*, [1980] OLRB Rep. Jan.)

17. The line which the Board has traditionally drawn respecting the eligibility of employees to vote, namely that the employee be in the bargaining unit both on the date that the vote is ordered (or on the terminal date in a pre-hearing vote or as otherwise agreed by the parties) and on the date the vote is taken, is clear and well known through the Board’s published decisions, its practice notes (see Practice Note No. 9, August 1964) and its layman’s handbook. While originally the Board merely stated that employees in the bargaining unit would be entitled to vote (see e.g., *The Borden Co. Ltd.*, (1946), 46 CLLC ¶16,461) it evolved the two-pronged eligibility rule to give greater clarity and certainty to voter’s lists, as well as to eliminate the possibility of an employer influencing the outcome of a vote by hiring new employees. The Board’s practice and the principles underlying it were well canvassed in *J. McLeod & Sons Ltd.*, [1970] OLRB Rep. Feb. 1316.

18. In this case the respondent and the objecting employees invite the Board to adopt a different rule. They submit that if an employee has indicated an intention to leave the workplace he or she should not be permitted to influence the outcome of a representation vote. When pressed on the point, however, they are less than clear as to how that principle can be applied in any general way. Is an employee to be deprived of his franchise if, before a representation vote, he indicates an intention to leave his employment within three weeks of the vote? Or three months? Or six months? And is the result of a closely contested vote to be disturbed if an employee who voted is transferred, quits or is discharged within a day or two after the vote? The Board must obviously adhere to a rule that gives some certainty and finality to the granting of bargaining rights and which can be readily understood and applied by the parties.

19. The Board’s past decisions give considerable guidance in the application of the rules regarding the eligibility of employees to vote in the selection of a bargaining agent. Employees on lay-off without a definite date of recall have been held ineligible to vote (*Rix Athabasca Uranium Mines Limited*, [1961] OLRB Rep. July 127.) The Board has found that a person who was an employee in the bargaining unit on the date the vote was ordered and was promoted to acting foreman on the date the vote was taken was ineligible to cast a ballot, notwithstanding that he later returned to the bargaining unit (*Success Display Limited*, [1971] OLRB Rep. Oct. 636). An employee who was absent on Workmen’s Compensation on the date the vote was ordered and on the date the vote was taken, but who had neither quit nor been terminated was found eligible to vote (*Alex’s Plumbing and Heating Limited*,

[1970] OLRB Feb. 1321). Where, on the other hand, an employee who was absent due to illness had been treated in all respects as terminated and had no real prospect of returning to work, the Board concluded that he was not eligible to vote (*Canac Kitchens Ltd.*, [1978] OLRB Rep. Aug. 723).

20. The Board's rule respecting eligibility to vote has sought to strike a balance. On the one hand the Board recognizes the interest of employees with a stake in future collective bargaining having a controlling voice in the choice of a bargaining agent. On the other hand it faces the necessity of establishing a democratic process with some finality in situations where employees are subject to varying degrees of turnover. From the Board's earliest days employees were not removed from the voter's list unless they had left their employment before the taking of the vote. The only recorded exception to this appears to have been in wartime: under P.C. 1003, the *Wartime Labour Relations Regulations*, the Board's practice was to exclude from voting eligibility an employee who prior to the taking of the vote had obtained a separation notice pursuant to Selective Service regulations. An employee subject to that irrevocable step was viewed as no longer sufficiently interested in employment relations in the plant to be entitled to influence the outcome. (*Packard Electric Co. Ltd.* (1944), 46 CLLC ¶16,424). There appears to be no other recorded variation from the Board's rules.

21. The Board's voter eligibility rules are not intended and do not purport to achieve a standard of perfect decimal point democracy, assuming such a standard can ever be achieved. The rules seek nothing more than to establish a substantially representative group of employees with a minimum of employment continuity for the purposes of certification. Any deliberate attempt to manipulate the eligibility rules and temporarily "pack" the voting constituency to influence the outcome of the vote can be dealt with through the Board's remedial authority in unfair labour practices (see, e.g. *Custom Aggregates*, [1978] OLRB Rep. Mar. 215). Any distortion in the selection process caused by a planned and *bona fide* substantial increase in the size of the bargaining unit in the near future can be accommodated by the application of the Board's build-up principles (*Emil Frant* 57 CLLC ¶18,057; *McCord Corporation* [1965] OLRB Rep. June 203; *Domco Foodservices Limited*, [1980] OLRB Rep. Jan. While the Board deals with these kinds of substantial changes in the bargaining unit, it cannot concern itself with the inevitable fact that some employees who are eligible to vote may have a more temporary or transitory interest in their jobs than others.

22. The Board has long recognized the right to vote of employees who are transitory, so long as they conform to the minimum requirement of the Board's two-pronged eligibility rule. If they are employed on the date the vote is ordered and continue to be employed to the date the vote is taken, they are entitled to vote. In *J. McLeod & Sons*, [1969] OLRB Rep. Dec. 1100, the Board confirmed the eligibility to vote of a group of employees who fell within the eligibility dates but who in fact had been hired temporarily. They were strikers from a nearby plant who expected to return to their normal employment at some indefinite future date. And in *University of Toronto*, [1974] OLRB Rep. May 267, the Board confirmed the right to vote of all teaching assistants and research assistants employed by the University even though the vote was conducted in May, at the end of the academic year, and a turnover rate of 25 per cent to 35 per cent of the bargaining unit was projected for the next academic year.

23. The selection of a bargaining agent under the Act cannot be conducted on the basis of an ongoing referendum geared to the daily, weekly or monthly changes in the people

who make up a bargaining unit. But bargaining rights are not necessarily permanent, and the Act allows for shifts in the wishes of employees whether through the turnover of personnel or otherwise. Any changes in the sentiment of a majority of the employees about union representation over time can be dealt with through the provisions of the Act for the termination of bargaining rights.

24. On the basis of the foregoing policy considerations, the Board is not persuaded that it should depart from its normal practice in this case to disturb the results of the representation vote. Moreover, the Board cannot agree, even given that Miss Cereghini did leave her job the day after the vote, that she had no interest in its outcome. (In this regard, it is doubtful whether the Board would again apply the narrow wartime rule in the *Packard Electric Co. Ltd.* case, *supra*). When the parties go to the bargaining table much is negotiable, including the possibility that the union will obtain wage increases and other benefits that are retroactive to the period of her employment. They might also negotiate a seniority formula that would give her credit for her past employment in the event of her return. An employee in the position of Miss Cereghini does have a genuine interest in the outcome of a representation vote.

25. For all of the foregoing reasons the Board is satisfied that it should not depart from applying its normal rule in this case. The Board therefore declines to disturb the result of the representation vote taken on January 22, 1980.

26. The Registrar is instructed to forward the report of the Returning Officer to the panel seized with the application.

1805-79-R London and District Service Workers' Union, Local 220
Applicant, v. **Maclea-Hunter Communications** Division of Maclea-Hunter
Cable TV Limited Respondent, v. Group of Employees Objectors.

Constitutional Law – Employer engaged in radio paging, mobile communication and telephone answering service – Paging and communication business involving transmission and reception of “radio communication” entirely within province – Whether under provincial jurisdiction

BEFORE: P. Picher, Vice-Chairman, and Board Members D. B. Archer and E. J. Brady.

APPEARANCES: *Ted Wohl and Al Campbell for the applicant; Donald J. McKillop, Q.C., Douglas Richardson, and Dorothy Turner for the Respondent; Phyllis Longthorne for the Objectors.*

DECISION OF THE BOARD; April 30, 1980

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2. This is an application for certification.

3. The respondent disputes the Board's jurisdiction to entertain this application. This, therefore, is a preliminary decision directed solely to a determination of the jurisdictional question.

4. The employees encompassed by the union's application for certification are involved in three aspects of the respondent's business: the radio paging service, the mobile communication service and the telephone answering service. The respondent contends that the Board lacks jurisdiction to entertain the application for certification on the grounds that the radio paging and mobile communication services are properly classified as "radio communication" within the meaning of the *Radio Act*, R.S.C. 1970, c. R-1, a subject which the respondent argues falls within the exclusive jurisdiction of the Parliament of Canada. Whether or not the telephone answering service of the respondent's business, standing by itself, would fall to federal jurisdiction, counsel contends that this aspect of the respondent's service cannot be severed from the paging and mobile communication portion of the respondent's business and, therefore, would also come under federal jurisdiction.

5. Mr. Douglas Richardson, General Manager of MacLean Hunter Communications explained that as regards the paging and mobile communication services the respondent may be described as being in the business of selling airtime and communication. For the mobile communication service they sell airtime to others who use it to facilitate their own businesses; with respect to the paging service they use airtime to sell communication. To carry on these two portions of their business the respondent is required to be licensed under the *Radio Act*, a federal statute. The service category of the licence is "Restricted Public Commercial" which Richardson testified indicates that their use of radio communication is the very source of their revenue. Their situation might be contrasted with a local taxi cab company using radio communication in their dispatch service merely to assist them in carrying on their business of transporting the public via taxis.

6. The paging and mobile communication aspect of the respondent's business is carried out solely within the Province of Ontario. Richardson testified that their licence as it relates to paging, for example, covers a range of approximately 15 miles, a radius falling completely within Ontario. We note, though, that the restriction encribed on the licence, "Where the herein licenced station is authorized to provide a radio paging service such service shall not be provided to persons residing outside Canada unless authorized by the Minister", does not prohibit service to another province.

7. The employees subject to this application work in an office in London, Ontario. To carry on the paging service the operators receive a message over the telephone in the London office and then send it over wires in the appropriate form to a transmitter four miles outside the city. On receipt by the transmitter, Hertzian waves are emitted to carry the message to the appropriate source. Hertzian waves are also the means by which the mobile communication service is provided.

8. Counsel for the respondent does not contend that the holding of a federal licence, by itself, brings the respondent under federal jurisdiction. He does not argue that a taxi company or ambulance service which might use radio communication to assist them in their work would come under federal jurisdiction simply because they require a licence issued pursuant to the *Radio Act* to operate their dispatch services. Counsel contends, however, that the respondent is subject to federal jurisdiction because radio communication is the es-

sence of the paging and mobile communication aspect of the respondent's business and that the *Radio Act* and Regulations thereto fundamentally control the respondent in the performance of this significant portion of their business.

9. The union argues, on the other hand, that the respondent is subject to provincial not federal jurisdiction because none of the respondent's business extends beyond the provincial boundaries.

10. If the respondent either received Hertzian waves from outside the province or intentionally transmitted them to points beyond Ontario, the union concedes that federal jurisdiction would inevitably attach. This is the first case of which this Board is aware, however, where the radio communication has been confined within the province for both its point of origin and point of intended delivery. Focusing on this distinction, the question to be determined by this Board may be phrased as follows: whether radio communication by Hertzian waves which has consistently been held to come within the jurisdiction of the federal government falls, instead, to the jurisdiction of the province when the origination of the radio waves and the point of the delivery of the message takes place entirely within the Province of Ontario.

11. *The British North America Act*, 1867, 30 & 31 Victoria, c. 31 (U.K.), as amended, allocates jurisdiction between the federal government and the provinces in sections 91 and 92 which read as follows:

"POWERS OF PARLIAMENT

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, *to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces*; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein after enumerated; that is to say,—

• • •

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES

92. In each Province the Legislature may exclusively make Laws in relation

to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, –

• • •

10. Local Works and Undertakings other than such as are of the following Classes: –

- (a) Lines of Steam or other Ships, Railways, Canals, *Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province*;
- (b) Lines of Steam Ships between the Province and any British or Foreign Country;
- (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.

• • •

13. Property and Civil Rights in the Province.

• • •

16. Generally all Matters of a merely local or private Nature in the Province.” [emphasis added]

In *Re Fisheries Act, 1914, A-G Can. v. A-G B.C.*, [1930] 1 D.L.R. 194 (P.C.) the Judicial Committee of the Privy Council laid down four principles relating to the relative legislative competence of the federal government and the provinces:

“1. The legislation of the Parliament of the Dominion, so long as it strictly relates to subjects of legislation expressly enumerated in s. 91, is of paramount authority, even though it trenches upon matters assigned to the provincial legislature by s. 92

2. The general power of legislation conferred upon the Parliament of the Dominion by s. 91 of the Act in supplement of the power to legislate upon the subjects expressly enumerated must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench on any of the subjects enumerated in s. 92, as within the scope of provincial legislation, unless these matters have attained such dimensions as to affect the body politic of the Dominion . . .

3. It is within the competence of the Dominion Parliament to provide for matters which though otherwise within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the

Parliament of the Dominion upon a subject of legislation expressly enumerated in s. 91

4. There can be a domain in which Provincial and Dominion legislation may overlap, in which case, neither legislation will be *ultra vires* if the field is clear, but if the field is not clear and the two legislations meet, the Dominion legislation must prevail.

12. The legislative jurisdiction over radio communication was first determined in Canada when the following question was referred to the Supreme Court of Canada in 1931 by the Governor-General in Council: "Has the Parliament of Canada jurisdiction to regulate and control radio communication, including the transmission and reception of signs, signals, pictures and sounds of all kinds by means of Hertzian waves, and including the right to determine the character, use and location of apparatus employed?" The question arose for consideration because Canada had signed treaties regulating radio communication and was faced with a question as to which legislature, the federal, provincial or both, had jurisdiction to pass the radio communication legislation required to insure compliance with Canada's obligations under the treaties. The majority of the Court, upheld on appeal to the Privy Council, answered the question referred to it in the affirmative.

13. The two heads of power contained in section 92 of *The British North America Act* under which the provinces claimed at least partial jurisdiction were section 92(13) – property and civil rights – and section 92(16) – things of a purely local and private nature. In their decision, *Re Regulation and Control of Radio Communication*, [1931] 4 D.L.R. 865, the majority of the Supreme Court of Canada, however, concluded on the basis of the scientific knowledge relating to Hertzian waves available at the time that radio communication was not either a matter of a merely local or private nature within the province or a subject related to property and civil rights. The Court reached this conclusion on the understanding that it was not possible to confine the effects of Hertzian waves within the limits of a province. At pp. 889-891 Smith, J. explained the extended effect of transmitted radio waves in the following way:

"The electro-magnetic waves sent out from a transmitting station ordinarily travel through space in all directions, and the distances at which they can be picked up by a receiver, and at which they may cause interference with other transmitting stations, vary with the electric power and the frequency used.

In Morecroft's *Elements of Radio Communication*, p. 98, there is a table showing the variation according to power. It is there stated that a 50-watt station will give good service at 10 miles, poor service at 100 miles, and interference at 600 miles; a 500-watt station will give good service at 30 miles, poor service at 300 miles, and interference at 1,800 miles; and a 5,000-watt station will give good service at 100 miles, poor service at 1,000 miles and interference at 6,000 miles. . . .

From what has been said above, and what further appears in the case, it is evident that all these services by radio communication would be rendered of little practical use to anybody if there were not regulation somewhere by which transmitting stations would be prevented from interfering with each other. . . .

When a transmitter sends out into space these electro-magnetic waves, they are projected in all directions for the great distances referred to, and it is not possible for the transmitter to confine them within the bounds of a Province. As already pointed out, a transmitter of only 50-watt power – the power of an ordinary house lamp – will radiate these waves in all directions around it for a distance of 600 miles with sufficient energy at that distance to disturb and interfere with any radio communication passing through that field on the same or nearly the same channel or frequency.” [emphasis added]

Lamont, J., who dissented in part agreed with the majority that the transmission of electro-magnetic waves could not be confined within provincial boundaries and should therefore be subject to the jurisdiction of the federal government. He said at pp. 884-885:

“When we consider the nature of radio communication and the fact that *once the electro-magnetic waves are discharged from the transmitting stations they cannot be confined within the boundaries of a Province*, or even the limits of a country, it is evident that a Provincial Legislature, whose jurisdiction is only Province-wide is not in a position to control the transmission of these waves, yet, without some control, radio communication would be impossible. *So far, therefore, as the transmission of the waves is concerned a very wide jurisdiction must, in the present state of the art, be conceded to the Dominion Parliament.* It belongs to Parliament because the more important matters which must be regulated and controlled lie in the international field where control can only be assured by treaty, convention or agreement between nations.” [emphasis added]

Lamont, J. disagreed with the bottom line of the majority decision, however, because of his view that the receiving of radio waves could be separated from the transmission of radio waves and his conclusion that receiving was of a merely local and private nature which in his opinion, therefore, was properly subject to provincial jurisdiction. As evident in the above quotation, however, he agreed with the majority’s conclusion that the transmission of electro-magnetic waves must fall to the jurisdiction of the federal government because, once discharged, they could not be confined within provincial boundaries.

14. Having concluded on the basis of the far reaching effects of transmitted radio waves that radio communication did not come within any of the enumerated heads of provincial power under section 92 of *The British North America Act*, the majority of the Court held that the federal government had complete jurisdiction over radio communication. The majority grounded its finding of federal jurisdiction in the initial words of section 91 giving the federal government power “... to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects of this Act assigned exclusively to the Legislatures of the Provinces”. As stated by Newcombe, J. at p. 874,

“...radio communication is a much more expansive matter and cannot, upon present information, be constructed in a manner to qualify as relating to matters of a local or private nature in the Province.

The subject is one which, undoubtedly, relates to the peace, order and

good Government of Canada; and I am not satisfied, for any of the reasons which have been submitted, or which I have been able to discover, that it falls within any of the classes of subject assigned exclusively to the Legislatures of the Provinces.”

15. The question was then appealed to the Judicial Committee of the Privy Council which upheld the decision of the Supreme Court of Canada. In their decision, *Re Regulation & Control of Radio Communication, A-G Que. v. A-G Can. et al* [1932] 2 D.L.R. 81, (also referred to as the *Radio Reference* case) the Privy Council focused on two grounds of federal jurisdiction over radio communication which had only been touched on by the Supreme Court of Canada. Referring to the federal government’s authority to pass legislation to implement its treaties the Privy Council stated that because the radio communication treaties in question had been signed by Canada as a Dominion on her own behalf rather than by Britain on behalf of Canada, the federal government’s treaty implementation powers found under section 132 of *The British North America Act* were not strictly applicable as a basis of federal jurisdiction. Their Lordships further explained that because the possibility of Canada binding herself to a treaty with foreign powers on her own behalf as a Dominion rather than merely becoming bound through Great Britain was not anticipated at the time of the drafting of *The British North America Act*, the jurisdiction to pass legislation implementing such a treaty was not explicitly mentioned in either section 91 or section 92. Notwithstanding the absence of an explicit reference in *The British North America Act* to a federal government power to pass legislation to implement treaties entered into on Canada’s own behalf, the Privy Council concluded that the power for the federal government to pass legislation to implement the radio communication treaties could be found in the general words of section 91 giving the federal government the power to make laws “for the Peace, Order and good Government of Canada...”

16. The Privy Council further concluded that the subject matter of radio communication fell to federal jurisdiction through section 92(10)(a) of *The British North America Act* providing that the federal government has jurisdiction over “... Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces or extending beyond the Limits of the Province...” Because the Supreme Court of Canada had grounded the federal government’s jurisdiction in the opening words of section 91 relating to its power to make laws for the peace, order and good government of Canada, it was unnecessary for the majority of that Court to address the further possibility of also finding federal jurisdiction under section 92(10)(a). As did the Supreme Court, the Privy Council rejected the argument of the provinces that radio communication could be divided into a transmission segment and receiving segment. Their Lordships concluded that because the transmitting instruments clearly had to be under the control of the Dominion (an apparent adoption of the reasoning of the Supreme Court of Canada that the transmission of radio waves could not be confined within provincial boundaries) so too did the receiving instruments. Lord Viscount Dunedin said at page 86,

“Once it is conceded, as it must be, keeping in view the duties under the Convention, that the transmitting instrument must be so to speak under the control of the Dominion, it follows in their Lordships’ opinion that the receiving instrument must share its fate. Broadcasting as a system cannot exist without both a transmitter and a receiver. The receiver is indeed useless without a transmitter and can be reduced to a nonentity if the transmitter

closes. The system cannot be divided into two parts, each independent of the other....

Their Lordships have therefore no doubt that the undertaking of broadcasting is an undertaking “connecting the Province with other Provinces and extending beyond the limits of the Province”.

17. The Lordships of the Privy Council concluded that broadcasting fell within both the words “telegraphs” in section 92(10)(a) and “undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province”. The Privy Council further explained the effect of a subject falling within the ambit of one of the excepted matters in section 92(10): through section 91(29) the subject assumes a preferential place in section 91 along with the other subjects specifically enumerated therein.

18. The decision of the Privy Council in the *Radio Reference* case, therefore, establishes exclusive federal jurisdiction over radio communication. For jurisdiction to pass legislation necessary to implement the radio communication treaties and conventions, its finding of federal jurisdiction is grounded in the federal government’s power in section 91 of *The British North America Act* to pass laws for the peace, order and good government of Canada. For general jurisdiction over the subject matter apart from the implementation of the Convention, it fixed federal power in section 92(10)(a) of *The British North America Act* which excludes from provincial jurisdiction undertakings which connect provinces or extend beyond the limits of the province.

19. The Privy Council does not in its judgment enter the detailed analysis of the scientific attributes of Hertzian waves that was, of necessity, extensively engaged in by the Supreme Court of Canada. However, a reading of the judgment of the Privy Council in its entirety indicates that the Privy Council fully endorsed the Supreme Court’s conclusions that radio communication could not fall to provincial jurisdiction under either section 92(13) – property and civil rights or section 92(10) – matters of merely local or private nature – for the reason that Hertzian waves could not be contained within provincial boundaries. In support of our interpretation of the Privy Council’s decision, we note particularly such statements in the decision as “... upon the whole matter therefore their Lordships have no hesitation in holding that the judgment of the majority of the Supreme Court was right...”, and “once it is conceded, as it must be, that the transmitting instrument must be... under the control of the Dominion...” as well as the statement in their analogy to aeronautics, “it is quite possible to fly without going outside the Province” [emphasis added]. In the Board’s assessment the Privy Council’s finding of federal jurisdiction over radio communication was not limited to a factual situation where the point of emission of the radio wave was in one province and the point of the intended reception of that wave was in another. Rather, the Board concludes that the Privy Council determined that radio communication by Hertzian waves, whatever the points of emission and delivery, was a matter coming within the exclusive jurisdiction of the Parliament of Canada.

20. Both the Board’s interpretation of the *Radio Reference* case and the *Radio Reference* decision itself are explicitly supported by two Supreme Court of Canada decisions: *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* (1977), 81 D.L.R. (3d) 609 and *Re Public Service Board, Dionne and Attorney General of Canada* (1977), 83 D.L.R. (3d) 178.

21. In *Capital Cities Communications Inc. v. Canadian Radio-Television Commission* (1977), 81 D.L.R. (3d) 609, the Supreme Court of Canada held that the Parliament of Canada had exclusive legislative authority over the regulation of cable television stations and their programming at least where the interception of television signals and their transmission to cablevision subscribers was involved in the programming. Once again the Court refused to sever the reception of signals and their re-transmission. Accordingly, the Court held that the undertaking in question which consisted of the reception of television signals from outside the province and their re-transmission in Quebec through coaxial cables to subscribers, also in Quebec, was a single undertaking which fell to federal jurisdiction under section 92(10)(a) as an undertaking which extends beyond the province. The Court rejected the argument made by the appellant, Capital Cities, that the cable re-transmission aspect of the scheme was a separate and local undertaking by virtue of the fact that both the point of re-transmission of the signal over coaxial cables and the reception of the signal by subscribers all took place within the Province of Quebec and was accomplished through the use of self-contained coaxial cables rather than Hertzian waves.

22. While the facts of the case at hand, where the point of the origin of the Hertzian wave and the point of intended reception is within the same province, differ from the *Capital Cities* case, where the original transmission of the Hertzian wave to the point of re-transmission crossed a provincial boundary, the decision of the Supreme Court of Canada strongly suggests that this factual distinction does not affect the constitutional jurisdiction. Laskin, C.J.C. at pp. 621-622 said:

"Such signals may, of course, come by Hertzian waves from within a particular Province as well as from without it. The contention appears to be that since there is a local character to the cable distribution system in its physical aspect, and *it may be receiving signals intraprovincially*, it does not fall under total federal legislative authority. I understood, however, *that it was conceded that federal jurisdiction was exclusive in respect of the receipt of signals at the antenna of the cable distribution system, wherever be their point of emanation*. If that be the case, I do not see how legislative competence ceases in respect of these signals merely because the undertaking which receives them and sends them on to its local subscribers does so through a different technology." [emphasis added]

At p. 617 Laskin, C.J.C. further said,

"In dealing with the constitutional authority of Parliament to regulate cable distribution systems which receive and distribute television signals, I leave to one side, so far as the present case is concerned, the determination of regulatory authority over programmes carried by such systems which are of their own origination and which are transmitted to their subscribers in the Province of such origination, and hence not received by other owners of television sets in the Province."

Consistent with the Board's interpretation of the *Radio Reference* case, these passages, in our view, express the position of the Supreme Court of Canada that any transmission through Hertzian waves whether emanating from within the province in which they are received or outside that province falls to the jurisdiction of the Parliament of Canada for the

reasons developed in the *Radio Reference* case. Given the different technology involved in the transmission of a signal by electrical impulses over coaxial cables, however, the Court has left to one side the determination of the constitutional jurisdiction of a cable television distribution enterprise receiving and transmitting entirely through coaxial cables rather than Hertzian waves programs developed by it in the province for subscribers who are also in the same province. Because the cablevision stations and their programming at issue in *Capital Cities* involved the interception of television signals the Court did not need to address that matter and readily held that the enterprise fell entirely within the jurisdiction of the Parliament of Canada even though the cable distribution aspect of the enterprise was located entirely within Quebec.

23. The Supreme Court of Canada reached the same conclusion in *Re Public Service Board, Dionne and Attorney General of Canada*, *supra*, a decision released by the Court concurrently with *Capital Cities*.

24. The Union in this case argued that the decisions in the *Capital Cities* and *Dionne* cases should be confined to the fact situations existing therein where the points of emission of the Hertzian waves and their intended reception at the antenna clearly crossed provincial lines. The union relied heavily on the dissent of Mr. Justice Pigeon in the *Dionne* case to argue that because the radio transmission carried on by MacLean Hunter is both emitted and received in Ontario it would properly be classified as a local undertaking subject to provincial jurisdiction. In reviewing Pigeon's J.s dissent, however, this Board finds support for the position of the company rather than that of the union. Pigeon, J. dissented from the majority on the basis of his opinion that because of the different, and presumably more containable, technology involved in cabletelevision, a distinction should be made between the radio communication aspect of its undertaking and the cable distribution portion. At p. 183 he framed the issue as follows:

"In my view, the question in this case is whether the *unchallengeable federal jurisdiction over the radiocommunication* involves exclusive legislative authority over all cable distribution systems making use of signals received by radio communication or whether such exclusive authority extends only to what I will call the radio communication aspect." [emphasis added]

At pp. 185-188 he expressed the basis of his opinion that the undertaking could be divided:

"In support of federal jurisdiction over coaxial cable networks it is contended that the change of technology in transmission should make no difference. *The fallacy of this argument is that it is inconsistent with the very basis of federal jurisdiction which is the use of hertzian waves.* . . .

In *Re Regulation and Control of Radio Communication; A.-G. Que. v. A.-G. Can.*, [1931] 4 D.L.R. 865, [1931] S.C.R. 541, 39 C.R.C. 50; affirmed [1932] 2 D.L.R. 81, [1932] A.C. 304, [1932] 1 W.W.R. 563, C.R.C. *loc. cit.*, the judgments of the majority in this Court which were affirmed by the Privy Council, *make it abundantly clear that the very basis of federal jurisdiction was that hertzian waves, by their very nature, could not be confined with a Province.* . . .

With respect to what was said by the Privy Council, it is important to bear in mind that the case was a reference dealing solely with 'radio communications', that is transmissions by means of hertzian waves. The language used should be construed in the light of the question which was under consideration and should not be treated as applicable to any entirely different question. . . .

. . . it must be considered that a cable-distribution network has to be carried either in underground conduits, as is done only in some densely built urban areas, or, as in this case, carried over utility poles. Those utilities are, as a rule, under provincial jurisdiction as in these cases. In fact the cable networks are, in the main, the property of a provincial telephone company and the cable operators are only lessees. . . .

It will thus be seen that from a physical point of view, with respect to the material set-up which is the essential feature of a cable system, the provincial aspect is by far predominant. The distinctive feature of a cable system, as opposed to radio broadcasting is that its signals of communication are carried over metal cables strung on poles throughout the area served instead of being carried over what is commonly called 'airwaves'." [emphasis added]

Two views are put forward in the judgment of Mr. Justice Pigeon: firstly, that because cable-television enterprises transmit their signals through physically tangible cables located entirely within the province rather than airwaves, it should be classified for constitutional purposes as a local undertaking and, secondly, that the cabletelevision station's admitted use of radio waves to capture the signal it then transmits over its cables should not, itself, render it "federal". For emphasis, Pigeon, J. points to what he calls the absurdity of classifying a local taxi company as "federal" just because it has a dispatch service which uses radiocommunication. At p. 188, however, he acknowledges that the taxi company's use of radio communication "is accessory to [its] principle business". The Board finds nothing in his judgment which would support the contention that a company which is principally engaged in radio communication would fall to provincial jurisdiction even where the points of emission and intended reception of the Hertzian waves are within one province. To the contrary, his dissent, in the Board's view, supports the company's position.

25. The British Columbia Labour Relations Board addressed the question of the constitutional jurisdiction of a company similar to the respondent in this case in *Tasco Telephone Answering Exchange Ltd.*, [1977] 1 Can LRBR 273. Tasco's business included both radio paging within a 50 mile radius of Greater Vancouver and telephone answering services. Unlike the instant case, however, it was established in *Tasco* that the telephone answering service constituted the greatest bulk of Tasco's service to the public. In determining the constitutional jurisdiction of the paging aspect of Tasco's business, the Board focused on the root principles developed in the *Radio Reference* case and did not mention the fact that a 50 mile radius of Greater Vancouver, might extend beyond the province. At pp. 275-276 the Board said,

"... the field of radio communication – a subject matter which was neither existing nor contemplated when ss. 91 and 92 of the B.N.A. Act were drafted in 1867 – has been held by the courts to fall within the federal legisla-

tive jurisdiction. The key decision in that regard was the *Radio Reference* case (in *Re Regulation and control of Radio Communication in Canada*, [1932] A.C. 304). There the Privy Council held that radio communications was a matter of national interest and importance and therefore was and is a class of subject which affects the body politic of Canada. It was felt to be important enough a matter to warrant a single legislative authority throughout Canada; because of the importance of the subject matter to Canada, there should be no disturbance of one authority conflicting with another. The matters of international treaties and conventions were canvassed, and the argument that the province was making, that there be a distinction between transmitting and receiving, was overruled.”

The Board in *Tasco* concluded that the essence of the radio paging service was communication through radio waves and that characteristic established the true nature of its business for the purpose of constitutional jurisdiction.

26. In answering the union’s hypothetical question concerning the constitutional jurisdiction of a taxi company or police force, the Board in *Tasco* distinguished the two situations emphasizing, as did Pigeon, J. in *Dionne*, that taxi companies are not in the business of radio communication.

27. The Board further refused to sever the telephone answering services aspect of *Tasco*’s business for constitutional purposes. Relying on *Re Tank Truck Transport Ltd.* (1960), 25 D.L.R. (2d) 161 (Ont. H.C.), the Board concluded at p. 278 that the “telephone answering service of the employer [could not] be considered distinct and apart from the other services, although it still constitutes a major portion of the services provided for customers”. The Board then found that *Tasco*’s operation as a whole fell to federal jurisdiction.

28. The facts of this case are distinguishable from those confronting the Privy Council, the Supreme Court of Canada and The British Columbia Labour Relations Board in the cases discussed above because in this case both the points of the emission and intended reception of the radio waves are at all times within the province of Ontario. The legal principles developed in the *Radio Reference* case and fully endorsed in two concurrent decisions rendered by the Supreme Court of Canada forty-five years later in *Capital Cities* and *Dionne*, however, inevitably point to the conclusion that when an undertaking, in whole or in part, is fundamentally engaged in the business of radio communication by means of Hertzian waves, that undertaking falls to federal jurisdiction whether or not the waves are both emitted and received in one province.

29. It was not argued before this Board that the technology of radio communication by Hertzian waves has progressed in such a way as to dislodge the assumption upon which the *Radio Reference* case was decided, that assumption being that Hertzian waves, once emitted, cannot be confined within provincial boundaries. In fact it is implicit in the Supreme Court’s decisions in *Capital Cities* and *Dionne* that that assumption still operates for radio waves even though different considerations might apply to the transmission of signals through electric impulses over coaxial cables.

30. Accordingly, on the basis of the well established judicial authority relating to radio communication, the Board finds that it lacks jurisdiction to entertain the application in

question. The essence of MacLean Hunter's paging and mobile communication services is radio communication by Hertzian waves and thus is appropriately classified as such for the purpose of determining constitutional jurisdiction. Notwithstanding the fact that the radio waves are both emitted and received in Ontario, the Board concludes that the enterprise falls to federal jurisdiction pursuant to either the combined operation of section 91(29) and 92(10)(a) of *The British North America Act* as constituting an undertaking which extends beyond the province or pursuant to the federal government's powers to make laws for the peace, order and good government of Canada, or both.

31. On the basis of the evidence before it, the Board, following the reasoning in *Tasco*, further concludes that the telephone answering service portion of the business is not severable from its paging and mobile communication services and for constitutional purposes, therefore, follows the disposition of the paging and mobile communication services.

32. For the reasons given above, therefore, the Board dismisses the application for certification for lack of jurisdiction.

1953-79-R Canadian Union of Public Employees, Applicant, v. **Middlesex-London District Health Unit**, Respondent, v. Association of Allied Health Professionals, Ontario: for and on behalf of its Chartered Local Association #4, Intervener.

Sale of a Business – Predecessor unit transferred to employer with large comprehensive bargaining unit – Predecessor unit would not be found appropriate in certification proceedings – No intermingling – Whether like bargaining units maintained – Whether employees coming within larger comprehensive unit

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford.

APPEARANCES: *J. Sack and Paul Senay for the applicant; no one for the respondent; Catherine Bowman and Miriam Edmundson for the intervener.*

DECISION OF THE BOARD; April 15, 1980

1. The applicant has applied to the Board under section 55 of *The Labour Relations Act* with respect to a "sale of a business" which took place between the Victorian Order of Nurses, London – St. Thomas Branch (hereinafter referred to as the "V.O.N.") and the respondent. The dispute is really between the applicant and the intervener concerning the representation of physiotherapists, occupational therapists and speech therapists in the Middlesex-London Home Care Programme.

2. Up to December 31, 1979, the V.O.N. operated the Home Care Programme and employed therapists, nurses, and clerical personnel in connection with that programme. All of the Home Care Programme employees were headquartered in a separate office in the

City of London, and the V.O.N. was responsible for the provision of the Home Care Programme to the respondent on a contract basis.

3. In March 1979, the V.O.N. first approached the respondent concerning a transfer of the Home Care Programme from the V.O.N. to the respondent. It was eventually agreed that the transfer would take place effective January 1, 1980, and it did take place on that date. From January 1, 1980, all those employed by the V.O.N. in the Home Care Programme became employees of the respondent.

4. It seems clear that the therapists employed in the Home Care Programme were aware of the prospective transfer sometime in May 1979. At that time they were also aware that the applicant represented the employees of the respondent and that the applicant would represent all employees, save the nurses, transferred upon the takeover of the Home Care Programme by the respondent. In the summer of 1979 the therapists were spoken to by representatives of the applicant and the intervener concerning union membership. A majority of the therapists apparently determined to join the intervener and it was certified on August 2, 1979 as bargaining agent for all physiotherapists, occupational therapists and speech therapists employed by the V.O.N. in its Home Care Programme. The description of the bargaining unit was agreed to by the intervener and the V.O.N. The applicant attempted to make representation to the Board at that time, but was not given standing. On December 20, 1979, a collective agreement was signed between the V.O.N. and the intervener for the period January 1, 1979 to December 31, 1979. Notice to bargain was given by the intervener to the V.O.N. on December 20, 1979.

5. As of January 1, 1980 all of the clerical staff employed in the Home Care Programme have become part of the C.U.P.E. "all employee" bargaining unit. The nurses are represented by the Ontario Nurses' Association and the only people with whose representation we are concerned are the therapists.

6. The evidence before the Board is that the location and functioning of the Home Care Programme is exactly the same as it was before the takeover. The only change from the employees' point of view is in the identity of the employer. There are no immediate plans to move the Home Care Programme office, or to house all of the employees of the respondent under one roof. Prior to the takeover, the respondent did not employ any therapists in a home care programme.

7. The therapists in the Home Care Programme are headquartered in an office on Dundas Street in the City of London. The clerical staff in that office has been represented by the applicant since the takeover by the respondent. The evidence was that the therapists have no dealings with the bookkeepers in the office and that their only dealings with the stenographic staff are to get messages. The stenographers do not type letters or reports for therapists.

8. The therapists are able to contact directly any support service needed to provide patient service. If the respondent can provide another service the patient needs, then the therapists can contact that part of the respondent's operation and involve it in the patient's care. To date, the Public Health Nurse is the only employee of the respondent utilized by the therapists. Prior to the takeover of the Home Care Programme by the respondent, the therapists were also able to make direct contact with any support service needed, including

the respondent's employees, and they were also able to use, and did use, the Public Health Nurse employed by the respondent. In other words, the degree of interaction with the respondent's other employees has not changed significantly since the respondent's takeover of the Home Care Programme.

9. The parties are agreed that the transaction before the Board is a sale of a business within section 55 of the Act. It is clear that the V.O.N., an employer who was either bound by a collective agreement or to whom notice to bargain for a renewal of that agreement was given, sold part of its business to the respondent. Therefore, were it not for the existence of the applicant, section 55 would be accepted as operating without question to bind the respondent in the same way as the V.O.N. was bound. Because notice to bargain was given the V.O.N. by the intervener, section 55(3) of the Act applies.

10. Most of the other employees of the respondent are represented by the applicant. There is no evidence of any intermingling, nor is this a situation where intermingling is deemed, therefore section 55(6) has no application in this case. Accordingly, the Board is concerned only with section 55(4) of the Act.

11. In *The Oshawa Wholesale Limited* case, [1965] OLRB Rep. Feb. 584, the Board dealt with a situation where the union had acquired bargaining rights for the employees of the predecessor employer by virtue of two separate certificates issued in August and September 1962. The sale occurred in November 1964, roughly two years later. There was some evidence of intermingling. The Board said, at page 585:

"It is implicit in subsection (2) of section 47a (now section 55) of The Labour Relations Act that the intention of the whole section is *to preserve the bargaining rights of a trade union in the event of the sale of a business to a person who becomes the employer of the employees in the bargaining unit.* [emphasis added]

and at page 586:

"... The practices of the Board in certification applications with respect to the appropriateness of bargaining units, however, may be circumscribed in an application under section 47a (now section 55), since the section provides, except in special circumstances, that a trade union continues to hold its bargaining rights in the *like* bargaining unit. In other words, *in applying section 47a [now section 55], the Board must consider not only what would be an appropriate bargaining unit in a certification proceeding, but also it must take into account, and in large measure be governed by, the scope of the bargaining unit already in existence.*"[emphasis added]

In *The Oshawa Wholesale Limited* case, there was a dissent filed which pointed out, in part, that there was intermingling, that the decision of the majority departed from the Board's practice of determining the appropriateness of bargaining units in the retail food industry, and also that there was some significance in the direction of the Legislature to determine "appropriate" bargaining units in cases of intermingling and "like" bargaining units in other cases.

12. In *The Corporation of the City of Kitchener* case, [1973] OLRB Rep. June 306, the Board pointed out that where there has been intermingling, section 55(6) of the Act directs it to consider the question of appropriateness. At page 310, after citing *The Oshawa Wholesale Limited* case, *supra*, with approval, the Board said in paragraph 12:

“... However, in applying the provisions of subsection (6) of section 55, the Board’s determination nonetheless must be based on an appropriate bargaining unit or units (see *Esex County Board of Education Case*, [1969] OLRB Rep. July 552. Applied to the circumstances of the instant application, the Board must strike a balance between preserving the bargaining rights held by the intervening trade unions prior to the amalgamations and at the same time determine a bargaining unit or units which are appropriate in the context of the structural organization of the respondent.”

13. There is no doubt that if the question of the appropriateness of a bargaining unit made up entirely of physiotherapists, occupational therapists and speech therapists in the Middlesex-London Home Care Programme were to be resolved in the same manner and using the same criteria applied at the time of certification, then the unit would not be found to be appropriate. Where the matter has been raised in certification cases, the Board has consistently refused to carve up all-employee units based upon this very professional status, a professional status which is not recognized by the Act. In this connection, see *Niagara Regional Health Unit*, [1975] OLRB Rep. Apr. 376 and *Eastern Ontario Health Unit*, [1976] OLRB Rep. Nov. 687.

14. It is the view of the Board though that the critical question is not the appropriateness of the bargaining unit but rather the determination of a “like bargaining unit” and the resolution of any conflict which exists between the bargaining rights of the applicant and the intervener. In other words, the applicable parts of the Act are subsections 3 and 4 of section 55.

15. In the case before us, there is a conflict between the bargaining rights of the applicant and the intervener. It is clear that the bargaining rights of the applicant are such that they would include the therapists in the Home Care Programme who were transferred at the time of the sale. In *City of Peterborough*, [1979] OLRB Rep. Feb. 133, the Board was faced with a similar problem when the City of Peterborough took over the bus transportation system previously operated by a private company under a franchise arrangement. Briefly, the former bus company employees were represented by one union, whereas another union held bargaining rights for all municipal employees which could include the former bus company employees. At pages 136 and 137 the Board said:

“13. The consistent point of departure in the decisions of the Board in applications under section 55 of the Act is a recognition that the primary purpose of the section is the preservation of employees’ bargaining rights upon the transfer of a business. The section protects employees of a transferred undertaking against automatically losing their union or seeing their bargaining rights transferred to a bargaining agent not of their choosing. Thus while the remedial scope of the section allows the Board to engage in an assessment of what is the appropriate

bargaining unit the criteria to be applied are not identical to those which obtain in an application for certification of previously unrepresented employees. While the Board may have regard to all of the criteria that apply to that determination in certification proceedings it must also, having regard to the purpose of section 55, seek to balance the interests of the employees of the transferred undertaking and their union with the interests of both the employer purchasing the undertaking as well as the interests of the employer's existing employees and their union. In the fashioning or amending of bargaining units under section 55 of the Act the Board must give effect to existing bargaining rights to the extent that those rights can be reasonably accommodated within the new employer's administrative structures. (*Oshawa Wholesale Ltd.*, [1965] OLRB Rep. Feb. 504; *The Corp. of the City of Kitchener* [1973] OLRB Rep. June 306; *Yarntex Perth, Division of Yarntex Corporation Ltd.* [1975] OLRB Rep. Feb. 137).

14. A particular concern in the determination of bargaining units under section 55 of *The Labour Relations Act* is that existing bargaining structures not lightly be interfered with. The Board recognizes the value of a bargaining unit that has developed through a succession of collective agreements. A bargaining structure with some substantial history to it often indicates a sound bargaining relationship. More often than not it has evolved through increased communication and has come to reflect a workable pattern of mutual expectations between union and employer. Since the promotion of sound collective bargaining relationships is what *The Labour Relations Act* is all about, the Board is understandably reluctant to dismantle a bargaining structure that has withstood the test of time.

15. In this case the evidence establishes that the drivers, mechanics and cleaners employed in the transportation service work in locations separate from the other employees of the City. They have a history of working together and bargaining together through the applicant. They share a separate community of interest from other City employees having regard both to the nature and the location of their work and to the cadre of immediate supervisors under whom they function. The employees in question are presently constituted as a sound and viable bargaining unit and there is no reason to believe that the continuation of the bargaining rights that they enjoy will unduly hamper the employer's operations. In these circumstances the Board sees no useful labour relations purpose to be served by destroying that bargaining unit in whole or in part. The Board therefore finds that the bargaining rights of the applicant should be preserved and that the scope of the bargaining unit of transit employees should continue as it was constituted under Border Transit Limited."

16. In that case, one of the factors considered by the Board was the long history of bargaining by the union representing the former bus company employees. Admittedly, no such long history exists here. However, in paragraph 15 the Board also considered other fac-

tors such as the separate location of the former bus company employees, their history of working and bargaining together, etc. When those criteria are applied here, the following are applicable:

- (a) the therapists work in a location separate from those of the other employees of the respondent except for the clerical staff formerly employed by the V.O.N.;
- (b) the therapists have a history of working together;
- (c) they share a separate community of interest from the respondent's other employees having regard to the nature and location of their work and also their immediate supervisors;
- (d) there is nothing to suggest that the continuation of the intervener's bargaining rights will unduly hamper the respondent's operations.

In addition there is nothing to suggest that the therapists would not continue to be a sound and viable unit.

17. In the past, the Board has not been influenced only by the fact that it had before it an existing bargaining unit which would not be considered appropriate, using the same criteria applied in an application for certification. See *The Oshawa Wholesale Limited* case, *supra*. The Board has tended to respect and preserve existing bargaining rights unless the circumstances strongly indicated that they must be sacrificed. In this case, were it not for the short history of representation by the intervener, there would probably be no question concerning its bargaining rights. It is the view of the Board that, given the lack of intermingling, and the factors mentioned in paragraph 16 of this decision, there is no compelling reason why the wishes of the therapists concerning their bargaining agent should be interfered with.

18. For all of the reasons contained herein the Board defines the like bargaining unit represented by the intervener as being:

All paramedical employees save and except nurses, supervisors, persons above the rank of supervisor, students employed during the school vacation period and persons covered by subsisting collective agreements.

For the purpose of clarity, paramedical employees include physiotherapists, occupational therapists and speech therapists in the Middlesex-London Home Care Program.

The recognition clause in the collective agreement between the applicant and the respondent is amended to read as follows:

"The Board recognizes the Canadian Union of Public Employees and/or its appointed agents, as the exclusive bargaining agency for all of the employees of the District Health Unit under this Agreement, save and except the following, which are excluded: The Medical Officer of

Health, Associated Medical Officer of Health, Director and Assistant Director Environmental Health Services, Administrator, Director of Nurses, Supervisor of Nurses, Director of Dental Services, Home Care Administrator, Nutritionist and Supervisor of Physio Therapy, and those persons covered by collective agreements with the O.N.A. or the Association of Allied Health Professionals, Dentists and School Medical Officer, also Secretary to the Medical Officer of Health and the Bookkeeper Accounts Clerk."

2220-79-R United Steelworkers of America, Applicant, v. Midnorthern Appliance Industries Corp., Respondent.

Bargaining Unit – Employer operating in several locations – Classification of employees subject of application working in single location – Whether municipal unit or single location unit appropriate

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members H.J.F. Ade and C.A. Ballentine

APPEARANCES: *Gerry Reeds and John Fitzpatrick for the applicant; Roy C. Filion and W. Gnat for the respondent.*

DECISION OF THE BOARD; April 23, 1980

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.
3. The parties are in agreement that the employees to be included in the bargaining unit all work at or out of the respondent's production and service facilities located at 255 Steeprock Avenue, in Metropolitan Toronto. The respondent also operates a number of retail outlets in Metropolitan Toronto where it employs both office and sales staff. Both parties are in agreement that office and sales staff should be excluded from the bargaining unit under consideration. On the basis of these facts the applicant submits that the bargaining unit should geographically be described in terms of Metropolitan Toronto. For its part, however, the respondent contends that the bargaining unit should be restricted to 255 Steeprock Avenue. In support of this contention the respondent relies upon what it claims to be the Board's general practice of certifying for specific locations where an employer has employees at more than one location within a municipality.
4. The Board's general practice is to describe bargaining units on a municipality-wide basis. As an exception to this practice, the Board will usually certify for specific locations within a municipality if an employer has employees at more than one location within the municipality. This exception, however, relates only to those situations where employees who would otherwise be included in the same bargaining unit are employed at different locations

in the same municipality. Where all of the employees who come within the classifications included in the bargaining unit are employed at one location, even though employees in other classifications are employed at other locations, the Board's practice is to describe the bargaining unit on a municipality-wide basis. (See: *The Great Atlantic & Pacific Tea Company, Limited*, [1969] OLRB Rep. Jan. 1017; and *F. Lepper and Son Ltd.*, File No. 0335-78-R, unreported decision dated June 14, 1978.) The Board is not satisfied that the facts of this case warrant a departure from this practice, and accordingly the bargaining unit will be described in terms of Metropolitan Toronto.

5. The respondent submits that the Board should exclude from the bargaining unit both persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period. The respondent has a history of employing students during the school vacation period but not part-time employees. In line with the policy enunciated in the *Inter-City Bandag (Ontario) Limited* case, File No. 2178-79-R, decision dated March 21, 1980, as yet unreported, the Board is prepared to exclude from the bargaining unit students employed during the school vacation period, but not part-time employees.

6. The parties are in disagreement as to whether or not dispatchers and call takers should be excluded from the bargaining unit. In these circumstances, the Board appoints Mr. C. Robicheau, Labour Relations Officer, to inquire into and report back to the Board on the duties and responsibilities of persons coming within these two classifications.

7. No matter what the Board's final determination might be concerning the possible exclusion of dispatchers and call takers from the bargaining unit, the Board is satisfied that more than 55 per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on March 12, 1980, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. Having regard to the provisions of section 6(1a) of the Act, the Board hereby certifies the applicant on an interim basis for all employees of the respondent working at or out of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, dispatchers, call takers, office and sales staff and students employed during the school vacation period.

9. For the purposes of clarity, the Board declares that employees of the respondent working at its retail stores are not included in the bargaining unit.

10. A formal certificate must await a final resolution of the composition of the bargaining unit.

1972-79-R Union of Canadian Retail Employees, Local 1000A Chartered by the United Food and Commercial Workers International Union Applicant, v. **More Groceteria Limited**, Douglas R. More, and Loblaws Limited Respondents.

Sale of a Business – Loblaws closing supermarket and opening new store five miles away – Premises taken over by another company – Whether sale of business or establishment of new business

BEFORE: George W. Adams, Chairman and Board Members W. G. Donnelly and M. J. Fenwick.

APPEARANCES: *Paul J. J. Cavalluzzo and Dan Gilbert for the applicant; and Frank A. Highley and Douglas R. More for the respondents.*

DECISION OF G. W. ADAMS, CHAIRMAN AND BOARD MEMBER M. J. FENWICK;
April 8, 1980

1. The respondent's name is changed to read: More Groceteria Limited and the style is amended to add Douglas R. More as a respondent.
2. The applicant applies under section 55 of *The Labour Relations Act* for a declaration that the respondent More Groceteria Limited is a successor employer and bound by the terms of a collective agreement between the applicant and Loblaws Limited as the said agreement pertains to certain premises located at 179 Wortley Road, London, Ontario.
3. A collective agreement was filed with the Board and describes the signatory trade union as: "Union of Canadian Retail Employees, Local 1000, Chartered by the Amalgamated Meat Cutters and Butcher Workmen of North America" (hereinafter referred to as Local 1000). The applicant advised the Board that it is the successor of that trade union by virtue of a merger between The Retail Clerks International Union (hereinafter referred to as "Retail Clerks") and the Amalgamated Meat Cutters and Butcher Workmen of North America (hereinafter referred to as "Amalgamated"). In 1978 the Union of Canadian Retail Employees merged with Amalgamated and Local 1000 was issued a charter dated November 1, 1978. The said charter was filed with the Board in this matter and we were advised that Local 1000 had obtained status before the Board in *Cordesco Limited*, File No. 1868-78-R on March 6, 1979, a decision which was also filed in this matter. In June of 1979 the Retail Clerks and Amalgamated merged in the manner approved by the Board in *Research Foods (1976) Limited* and described at paragraph 4 and 5 of that decision, thusly:

"The evidence establishes that the applicant organization is the direct result of a merger of two organizations which had previously established their status as trade unions for the purposes of the Act: the Retail Clerks International Union on the one hand and the Amalgamated Meat Cutters and Butcher Workmen of North America on the other. Mr. Clifford Evans, previously the International Vice-President and Canadian Director for the Retail Clerks testified that in January, 1979 the Retail Clerks Executive Board adopted both the merger agreement and the constitution proposed for the merged organization. The Execu-

tive then called a special convention for June 5th and 6th, 1979 where the merger agreement and proposed constitution were unanimously approved by delegates representing the members of the Retail Clerks. Mr. Romeo Mathieu previously the International Vice-President of the Amalgamated Meat Cutters and Canadian Director testified that in January their International Executive Board similarly adopted the merger agreement and proposed constitution and called a special convention for June 5th and 6th where their delegates also approved the two documents. The following day, on June 7th, the first meeting of the merged association was convened.

The merger agreement stipulated that all members of the Retail Clerks and the Amalgamated would be members of the merged organization upon the effective date of the merger which was, by the terms of the merger agreement, the date upon which the Retail Clerks and Amalgamated approved the merger agreement. At the same time as each parent union approved the merger agreement, the respective delegates also approved the constitution for the new organization. The merger agreement also made provision for the persons who were to be officers in the merged organization. The International President of the Retail Clerks, for example, was to be the President of the merged organization and the International Secretary-Treasurer of the Amalgamated was to be the International Secretary-Treasurer of the applicant. In approving the merger agreement, therefore, the Board concludes that the two organizations approved these persons as officers for the new organization held on June 7th, the officers, in accordance with the terms of the merger agreement, were formally installed as officers of the applicant organization. The constitution for the merged organization provides for a procedure for the election of officers and calling of meetings. In accordance with the provisions of section 1(1)(n) of The Labour Relations Act, the constitution establishes that one of its purposes is the regulation of relations between employees and employers. It appears from the evidence that since its founding convention on June 7, 1979 the merged organization has been functioning in accordance with its constitution."

4. Paragraph 11(A) of the merger agreement between the two trade unions provided:

"11. Local Unions and Other Chartered Bodies

(A) Each chartered body of either the Retail Clerks or the Amalgamated shall retain its charter as of the date of its original issue and become, by virtue of the consolidation, a chartered body of the Merged Organization. Should the charter number of Local Unions in the Retail Clerks and the Amalgamated be the same, the International President and International Secretary-Treasurer may assign identification designations to avoid confusion. The International President and International Secretary-Treasurer of the Merged Organization shall issue new

charters to all Retail Clerks and Amalgamated chartered bodies. The charters will contain the date of their original chartering by the Retail Clerks or the Amalgamated. The International President and International Secretary-Treasurer shall jointly issue all future charters. All charters shall be signed by the International President and International Secretary-Treasurer of the Merged Organization.”

Paragraphs 15(A), (B), (C) and (D) provided:

“15. Rights, Property, and Obligations Of Merged Organization

(A) On the effective date of the merger, all the property, real, personal, and mixed, and all rights, title, and interest, either legal or equitable, in any monies, funds, or property, tangible and intangible, of the Retail Clerks and the Amalgamated, including but not limited to their respective separate names, trademarks, copyrights, labels, registrations, emblems, and union shop cards, and all debts due to each of them, all the rights, privileges, and powers, and every other interest of each of them, of whatever nature, shall, by virtue of the merger of the Retail Clerks and the Amalgamated, be transferred to and vested in the Merged Organization. Title to any property, real, personal, or mixed, legally or beneficially vested by deed or otherwise in the Retail Clerks or the Amalgamated, shall not be in any way impaired by reason of the merger but shall in all respects be vested in the Merged Organization by virtue of the merger. The Merged Organization shall, on and after the effective date of the merger, assume and be responsible for all the debts, liabilities, contract obligations, and other obligations of the Retail Clerks and the Amalgamated. Such debts, liabilities, contract obligations, and other obligations shall from that time forth attach to the Merged Organization to the same extent as if the said debts, liabilities, contract obligations, and other obligations were incurred or otherwise contracted by it.

(B) Nothing in this Merger Agreement shall affect the rights of any chartered body of the Retail Clerks or the Amalgamated in and to their respective assets under the provisions of the Constitution.

(C) The Merged Organization shall be deemed, for all purposes, to be a combination and continuation of the Retail Clerks and the Amalgamated. Neither of such organizations shall be deemed, for any purpose, to be dissolved, terminated, or discontinued, but upon the effective date of the merger the Constituent Unions shall be merged and continued as a single organization, governed by this Merger Agreement and the Constitution of the Merged Organization, which Constitution shall be an amendment to and substitute for the present separate constitutions of the Retail Clerks and the Amalgamated.

(D) The merger of the Retail Clerks and the Amalgamated shall not affect, interrupt, or change in any way the continuing status, or the

rights or duties with respect to third persons, of either the Retail Clerks or the Amalgamated or any organization chartered by the Retail Clerks or the Amalgamated, and further, shall not impair the status of such organizations in any pending action or proceedings, or any right, title, or interest in any property, or arising from any deeds, bonds, mortgages, leases, or contracts of any kind, including but not limited to recognition agreements and collective bargaining agreements, or the continuity thereof, and, further, shall not impair any federal, state, provincial, territorial, or commonwealth certification or any representational rights or any other rights or obligations of such organizations under their existing collective bargaining agreements or checkoff authorizations. All authority, power, and rights, jurisdictional and otherwise, held by or vested in the Retail Clerks and/or the Amalgamated under or in connection with any charter or affiliation with the AFL-CIO and CLC shall automatically be vested in the Merged Organization.”

5. By notice dated July 25, 1979 the International President and Secretary-Treasurer of the United Food and Commercial Workers International Union (the newly merged trade union) advised the applicant that pursuant to paragraph 11 of the merger agreement they were assigning the applicant a “alpha-numeric” identification of 1000A to avoid duplication. This notice was filed with the Board in this matter. It is also noted that by letter dated September 4, 1979 Loblaws was advised of this change which it acknowledged by letter dated September 10, 1979 over the signature of Mr. A. Faas, Director of Industrial Relations.

6. The respondent(s) were given the opportunity to inspect all of these filings which had been transferred from Board File No. 1718-79-R and its counsel indicated that he wished to make no representations in this respect, leaving the Board to satisfy itself as to the propriety of documentation so filed.

7. Having regard to these filings; to the earlier decisions of the Board in *Cordesco Limited, supra*, and *Research Foods (1976) Limited*; and to the provisions of *The Labour Relations Act* as previously applied in *The Spectator*, [1974] OLRB Rep. April 235, the Board is satisfied that the applicant is the successor union to Local 1000, signatory to the collective agreement with Loblaws Limited filed with the Board.

8. This then brings us to the principal issue of whether Loblaws Limited sold a part of its business to the respondent(s) so as to bring into operation the provisions of section 55 of *The Labour Relations Act* upon which the applicant relies. Section 55 provides, in part:

“55. – (1) In this section,

(a) ‘business’ includes a part or parts thereof;

(b) ‘sells’ includes leases, transfers and any other manner of disposition, and ‘sold’ and ‘sale’ have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the per-

son to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.”

9. The facts are not in dispute and were introduced through the testimony of Douglas R. More, the sole shareholder of the respondent company and an officer of that company. The respondent company was incorporated December 3, 1979, although More owned another retail food store in Stratford, Ontario. He testified that he had read in the newspaper that Loblaws was closing down its store at 179 Wortley Road, in the City of London and, as a consequence, he went to London and inspected the premises. The premises and location were sufficiently agreeable that he contacted a Mr. Doug Price who was described to the Board as the Property Manager of Loblaws. Following a meeting with Price on November 5, 1979 and a further inspection of the premises and its contents, More entered into both a lease with Loblaws for the premises and a bill of sale in the amount of \$14,000 for certain “goods, chattels and effects” contained therein. The lease’s preamble notes that by head lease dated May 28, 1958, Sun Life Assurance Company of Canada leased the premises to Loblaws for thirty (30) years commencing June 1, 1954 with the option of renewing the lease for each of four (4) renewal terms of five (5) years each.

10. By paragraph 4(G) of the sublease to More, he covenanted to use the demised premises only for a retail food market. By paragraph 4(Q) his power of assignment was limited. The duration of the lease is for five (5) years from December 1, 1979 to November 30, 1984 with the option to renew for two additional five year terms provided that Loblaws exercises partnering options under the head lease.

11. Loblaws discontinued its operation of the premises on Saturday, December 1, 1979. More, apparently acting through the respondent company, took possession of the premises on December 5, 1979 and opened for business on December 19, 1979. More advised that neither he nor his respondent company has an ongoing business or commercial relationship with Loblaws other than the lease. The respondent(s) acquired no foodstuffs from Loblaws and markets none of the company’s products. Indeed, Loblaws is considered a competitor. More advised the Board that two weeks before Loblaws closed the Wortley Road store, it opened a “super store” five miles away at Highway 401 and Wellington Street in the City of London. There’s also a daily bus service from the Wortley Road premises to the super store for the first week after it closed the Wortley Road store and thereafter bi-weekly until the respondent(s) opened for business. The bus service ceased the Friday before the respondent(s) opened for business and was provided free of charge.

12. When the respondent(s) opened the store, five full-time employees and six part-time employees were employed. It is common ground between the parties that all Loblaws’ employees who had worked at the subject premises were transferred to other Loblaws stores under a guarantee of employment clause contained in the subject collective agreement.

13. On cross-examination, More acknowledged that a local church group had pro-

tested the closing of the Wortley Road store by Loblaws because a significant number of older people resided nearby the store and for whom a two mile walk to the nearest store would be extremely inconvenient. More acknowledged that the premises constituted a “neighbourhood store” in that it relies on local clientele. He also admitted that the purchase of the fixtures and chattels was conditional on the granting of the sublease. And, finally, More acknowledged that on commencing business he placed advertisements in certain “penny saver” newspapers describing the store as “formerly Loblaws” or words to that effect.

14. Counsel for the respondent(s) submitted that these facts did not disclose the sale of part of Loblaws business to the respondent(s). He submitted that the respondent(s) represented a parallel business which existed previous to the acquisition of the Wortley Road premises. He stressed the arms length relationship between Loblaws and More and the respondent company and argued that More had simply purchased certain fixtures and chattels from Loblaws together with the granting of a lease. He pointed to the existence of two Loblaws stores nearby and to the fact that Loblaws had attempted to dissipate any goodwill associated with the premises by providing a free bus service to other stores for a period of time. Counsel for the applicant, of course, argued the contrary. He pointed to the fact that there had been direct dealings between the respondent(s) (more accurately More) and Loblaws and that Loblaws retained ultimate control over the premises. He pointed to the fact that there had been very little hiatus between the closing of the store by Loblaws and its opening by the respondent(s). He also asked the Board to note that the respondent(s) had not operated previously in the immediate vicinity nor did Loblaws continue or commence to operate nearby. It was his submission, that the busing by Loblaws was to preserve the local goodwill associated with the premises until the store reopened and was not designed to dissipate it. He submitted that had Loblaws intended the latter, it would have continued to provide the bus service after the respondent(s) opened for business. He also reminded the Board of the protest of the store closing on behalf of local consumers. Council accompanied these submissions on the fact with exhaustive and thoughtful representations on the legal principles to be applied. In the light of this analysis, he argued that in these kinds of cases the rule was and ought to be that a transfer of a store location from one retail food operation to another constitutes a sale of a business unless the circumstances are such that the location itself is no longer of value as a retail store in that the habit of customers to patronize the store is broken or spent.

15. Section 55 of *The Labour Relations Act* is a very important part of the legislation guarding against the subversion of acquired collective bargaining rights and providing some permanence to them in an otherwise volatile commercial context. In the former respect, it is assisted by the various unfair labour practice sections of the *Act* together with section 1(4) which permits the Board to treat as one employer a business carried on through more than one corporation where there is a common control or direction and whether or not these businesses are being carried on simultaneously. An interesting early example of this unfair labour practice aspect of the provision can be found in the important *Thorco Manufacturing Limited*, (1965), 65 CLLC ¶16,052 case, a case that today could be just as fairly dealt with under section 1(4). However, this purpose of the provision is not applicable in the facts at hand. We are satisfied that the relationship between the respondent(s) and Loblaws has been arms length and there is no evidence that the subject commercial transactions were other than for bona fides business purposes.

16. Unfortunately, however, the latter function of the section – providing some permanence to collective bargaining rights – is often the most difficult to apply. Here the Legislature has determined that the objectives of labour relations policies require that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by protection to the employees from a sudden change in the employment relationship. Indeed, the transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees and their representatives are assured of some real measure of continuity in the collective bargaining process by operation of law. So strong is the basis to this policy that the Supreme Court of the United States arrived at a similar conclusion without the benefit of a specific statutory provision like section 55. See *John Wiley & Sons Inc. v Livingston*, (1964), 376 U.S. 543, 84 S.Ct. 909; Goldberg, *The Labor Law Obligations of a Successor Employer* (1969), 63 N.W.L.Rev. 735; Note, (1966), 66 Col.L.Rev. 967; Note, (1969), 82 Harv.L.Rev. 418. This ongoing nature of collective bargaining agreements underlines again that such documents are not “ordinary contracts” nor are they in any real sense the simple products of consensual relationships. See *McGavin Toastmaster Ltd. v Ainscough et al*, [1976] 1 S.C.R. 718; 54 D.L.R. (3d) 1 Laskin, C.J.C. It is against these impressive policy considerations that the Board must give meaning to and apply section 55.

17. The fundamental issue in cases of this kind is the threshold determination of the section: Has a business been sold? The term “sells” is defined to *include* “leases, transfers; and any other money of disposition.” This all-embrasive definition obviously reflects the labour relations policy considerations discussed generally above. To repeat, collective bargaining rights are not to be treated as co-extensive with commercial ownership and, to this extent, labour law policy seeks to insulate industrial relations from disruption by necessary and inevitable interaction in the market place. The term “business”, on the other hand, is simply defined to *include* “a part or parts thereof.” No similar exhaustive definition was attempted by the Legislature in recognition, we think, of the great diversity in commercial affairs and the resulting need for a case by case elaboration of the term in the light of labour law policy. A brief perusal of the many factual situations giving rise to the Board’s jurisprudence bears testimony to the wisdom of this legislative choice. Accordingly, at the outset of reviewing a few of the cases that have applied the term “business” in the context of retail food stores, it should not be surprising to learn that the Board in determining whether a business has been sold has not deferred to the commercial documentation employed; has not been influenced by the use of intermediary agents to effect transfers; and has not made simple distinctions between asset and business dispositions. Rather, it has tried to make workplace assessments with respect to the continuity of a particular enterprise, activity, or service arriving at conclusions that a court of law in a commercial matter might not arrive at, but conclusions which are fair to both the statute and context under review. See *Gordons Markets* (decision of the Divisional Court of Ontario, unreported, November 21, 1978). This we understand to be the main purport of the following excerpt taken from *R. v. B.C. Labour Relations Board ex parte Lodum Holdings Ltd.*, (1969), 3 D.L.R. (3d) 41 (B.C.S.C.) at page 52 per Dryer J.

“The importance of the “business” in its labour relations aspect is the jobs it provides for the employees. One factor to be considered therefore, is whether the same or substantially the same jobs are being performed. That depends on a number of factors, such as whether the jobs are being performed at the same or substantially the same times and places, in respect of

the same or substantially the same goods or services, and for the same or substantially the same customers or patrons, etc. These matters are, in my opinion, more important than the form of transfer.”

18. The retail food cases provide a classic illustration of the Board’s attempt to ground the definition of business to the peculiarities of a particular industry and the policy of the statute in providing some measure of permanence to the collective bargaining process. One of the first cases is *Dutch Boy Food Markets*, (1965), 65 CLLC ¶16,051. There the owner of certain premises in Kitchener leased the premises for fifteen (15) years to Carroll’s Limited who carried on a grocery business at the location for two years. Carroll’s in turn assigned its interest in the lease to Steinberg’s Limited who thereafter carried the same type of business for approximately seven years. In 1964 Kitchener Food signed an offer to purchase all leasehold improvements and fixtures at the subject location conditional on the assignment of the lease between the original owners of the premises and Carroll’s Limited. Steinberg’s ceased operations December 24, 1964 and, after extensive alterations, Kitchener Food opened for business February 10, 1965. None of the former employees of Steinberg’s were in the employ of Kitchener Food. In finding that Kitchener Food had purchased part of Steinberg’s business the Board observed that had Kitchener Food only purchased the contents of the subject premises and moved them into other premises, it would have had no difficulty in finding the transaction was only the sale of assets. But the transaction, in fact, amounted to a disposition of Steinberg’s entire operation in the Kitchener area. The Board also noted that the existence of a restrictive covenant by Steinberg’s would have conclusively established the sale of a business but the absence of such a covenant does not establish the contrary where the facts of the industry militate otherwise. It then went on to, in effect, find that the somewhat unusual features of the retail food supermarket gave a particular meaning to the term “business” often coincident with a disposition or relinquishing of the physical premises. In this respect it wrote:

“A retail food supermarket, unlike some other businesses, has no customer orders or lists which can be transferred to a purchaser who intends to carry on the same type of business. By the very nature of a retail food business, with the exception of the name, a vendor has no goodwill which he can effectively give or withhold from a purchaser. The success of a food supermarket is dependent, on large measure, upon the support of the people who live in the area in which the store is located. Accordingly, any goodwill consists in the habit of customers of the vendor continuing to patronize the food market located on the same premises. If there was any goodwill to be acquired by Kitchener Food it was inherent in the premises themselves in which Steinberg’s had carried on the same type of business as that carried on by Kitchener Food. Accordingly, the exemption of goodwill from the purchase price, in our opinion, has no real meaning.

Each food supermarket chain endeavours to attract customers on the particular quality of its merchandise. In this connection it features and advertises its own name brand products. Accordingly, it is to be expected that one chain food store would not be interested in acquiring the foodstuffs and inventory of another chain food store. This perhaps is particularly true in the instant case, since the evidence is that Steinberg’s ceased its operation on the premises in question because it had not proved to be a sufficiently profitable

operation to maintain. In our view, the failure of Kitchener Food to purchase the foodstuffs and inventory does not have any significant effect in our determination as to whether there was a sale of a 'business'.

With reference to the argument relating to the lapse of time before Kitchener Food opened its store, we are of the opinion that an analogy cannot be drawn between a retail food business and a manufacturing operation. In the latter case, if there was a shut down of the operation at the time of a sale to a purchaser who intends to carry on the same type of business, the result generally would be a production and financial loss to both the vendor and the purchaser. In the former case, however, it is generally necessary to shut down operations at the time of a sale in order to give the new owner an opportunity to make renovations which are in accord with its particular method of merchandising and carrying on business. It also allows time for the new owner to stock the premises with its own foodstuffs and inventory. In the instant case, Kitchener Food acted with all reasonable expedition in opening the premises for commercial operations following its acquisition of the premises. In our opinion, the fact that there was a time lapse between the cessation of Steinberg's operations and the commencement of operations by Kitchener Food does not make the transaction any less the sale of a 'business'."

19. Cases confirming these views with similar positive findings of business sales are *Leader's Clover Farms Food Market* [1966] OLRB Rep. Nov. 636; *L & M Food Markets (Ontario) Limited* [1965] OLRB Rep. Sept. 440; *Super City Discount Foods Limited* [1970] OLRB Rep. April 118; *Gordons Markets* [1978] OLRB Rep. Dec. 1102. However, it is to be noted that *Super City*, *supra*, and the two *Gordons Markets* cases involved non-arm's length transactions where the Board had little difficulty in concluding that intra-corporate group transfers of business activity had occurred.

20. Cases in the retail food industry where the Board has dismissed section 55 applications include *Sunnybrook Food Markets* [1966] OLRB Rep. Oct. 53; *Sunnybrook Food Market (Keele) Limited* [1974] OLRB Rep. Jan. 47; *Zehrs Markets Limited* [1974] OLRB Rep. Apr. 311; *Dominion Stores Limited* [1979] OLRB Rep. 626; and *Darrigo Consolidated Holdings Inc.* File No. 0266-79-R decision issued January 15, 1980. In the first *Sunnybrook* case Steinberg's operated stores in Ajax and Whitby prior to the assignment of its Whitby store lease to the respondent company. At about the time that Steinberg's closed the Whitby store it opened an Oshawa store and the Oshawa and Ajax stores were about five miles (distant) from the former Whitby location. In dismissing the application the Board appears to have been influenced by the fact that Steinberg's and Sunnybrook competed with each other by advertising in the community served by the other. Moreover, at the time Steinberg's closed its Whitby store and opened its Oshawa store, the move was prominently advertised at the Whitby store and customers urged to take their business to the Oshawa store. Focussing on these facts, the Board at paragraph 9 concluded:

"Having regard to all of the circumstances of the instant case, we conclude that this is not a case (such as the *Dutch Boy* case was) in which one employer goes out of business and another, purchasing all the substantial assets, opens for business at the same premises. Rather, this is a case in which an employ-

er, changing the location of its business operations within a particular market area, disposes of certain unwanted premises and other assets to a competitor. In arriving at this conclusion, we have had regard, *inter alia*, to the fact that Steinberg's retained the services of certain of its employees, who were transferred from Whitby to Oshawa. This is consistent with the conclusion that Steinberg's has not disposed of its business in the market area in question. We would agree with the view expressed by the majority of the Board in the *Dutch Boy* case that the differences or similarities in employment forces as between "predecessor" and "successor" employers would not otherwise be relevant to the issue."

Counsel for the applicant submitted that in this case the Board failed to take into account that the definition of "business" includes the disposition of *a part* of a business and that the case was also incorrect if it stands for the proposition that a business cannot be sold to a competitor. He also submitted that the Board's view of the relevant market area in this case was far too broad. He submitted that the relevant market area for a "neighbourhood store" should be confined to the immediate vicinity of the store without cogent market evidence to the contrary. While each case must be decided on its own facts and the particular panel hearing the facts is in the best position to make the necessary judgments, we find counsel's argument persuasive. We would decline to follow this case if it stands for the proposition counsel fears it supports. Clearly, an employer in this industry can dispose of a part of its business (and to a competitor) where it is prepared to gamble that a more remote store through widespread advertising can recapture all or part of that which it has ostensibly disposed of. Each of the parties to such a transaction is gambling with respect to the value of the disposition, but the facts of the case before this panel and our understanding of local patronage weighs against the conclusion of a mere asset disposition and lease assignment. Without evidence to the contrary, we accept counsel's submission that the relevant market of a neighbourhood store should be narrowly defined and the particular facts in this case support this conclusion.

21. In the second *Sunnybrook* case the "A & P" had the benefit of a ten year lease on certain premises in Brampton together with three five year options for renewal. At the conclusion of the ten year term, "A & P" gave six month's notice to the lessor that it would not be extending the lease. The evidence was that "A & P" had found the premises too small and outmoded; the profit was marginal; and it was negotiating for a replacement outlet in Brampton that was three times as large. "A & P" did not sell its fixtures to the respondent company until some six weeks before it ceased operations in the location fortifying the conclusion that there had been no direct or indirect transfer of the premises by "A & P" through the intermediary of the lessor. The relationship between the lessor and respondent company was therefore independent of "A & P" interests and its business decisions. Indeed, there had been no discussions about the lease between "A & P" and the respondent company and the sale of the fixtures was in no way conditional upon the successful completion of the lease transaction. The Board emphasized all of these factors in dismissing the application and disagreed with the general proposition that in the retail food business "the business adheres in the premises." Counsel did not contend that the case was incorrectly decided. Indeed, it shows that there are circumstances where an employer may come to a conclusion that a location is no longer of value to him and unilaterally take steps to cease operations. In such circumstances, the resulting disposition of trade fixtures appears just as that. However, in the facts at hand, there was direct dealings between Loblaws and More; the purchase of the fixtures was conditional on the granting of a sublease; and More is limited to using the prem-

ises as a retail grocery store. Further, we think the bus service maintained by Loblaws is more consistent with a desire to provide for the local customers until More got his store into operation. There is no evidence that Loblaws could be reasonably assured that the clientele of this store would patronize its other locations five and two miles distant. Rather, the commercial relationship between Loblaws and More is more akin to Loblaws selling and More buying a part of Loblaws business, although each side to the transaction gambling, to some extent, on its worth.

22. *Zehrs Markets Limited* [1974] OLRB Rep. Apr. 331 is another example of a situation where the Board concluded that occupation of certain physical premises involved the mere assignment of a lease. This case best illustrates the principle put forward by the applicant's counsel that the passage of time may so dissipate customer patronage that no ongoing business can be said to have been transferred. In that case, Busy B ceased operation in January of 1972 by virtue of an independent business decision regardless of the eventual disposition of the subject premises. Almost one year later Zehrs commenced operations. The hiatus of time weighed against the finding that Busy B had transferred a part of its business to Zehrs.

23. *Dominion Stores Limited* [1979] OLRB Rep. July 626 also demonstrates the Board's willingness to find against the sale of a business in appropriate circumstances. In that case Dominion stores operated a store in the immediate vicinity of the acquired premises and its occupation of the acquired premises (formerly occupied by Gordons) was accompanied by a closing of Dominion's original store in the area. This fact, together with a hiatus of five months convinced the Board that Dominion was simply moving its existing premises within the relevant market area and not acquiring the business of another. In doing so, Dominion achieved the elimination of a competitor through the benefit of a non-compete clause but there would appear to have been no evidence that Dominion's purpose was an increase in business by virtue of the operation of that provision. Indeed, the non-competition clause running with the lease appears to have been an incidental benefit in Dominion's independent dealings with the lessor. Had Dominion maintained its original store or if the principal purpose of the transaction had been to obtain the benefit of the non-competition clause, the result may well have been different. In the facts at hand, More does not operate another store in the area and, as noted before, the commercial relationship between Loblaws and More was direct.

24. Finally, in *Darrigo Consolidated Holdings Inc.* (*supra*) the Board was satisfied that Dominion stores had facilitated the transfer of only a lease to Darrigo and not a business because of a hiatus in business activity of some fourteen (14) months. Another confirmation of the principle recommended by counsel for the applicant.

25. Having regard to all of the foregoing and to the evidence before us we are satisfied, and we so find, that Douglas More and, latterly, the respondent company, purchased a part of Loblaws business. Accordingly, they are bound by the applicant's collective agreement with Loblaws and, more generally, subject to a collective bargaining relationship with the applicant as provided for by section 55.

DECISION OF BOARD MEMBER W. G. DONNELLY:

1. The majority of the Board has accurately set out the facts relevant to the disposi-

tion of this case and has reviewed the jurisprudence carefully in arriving at its conclusion that Loblaws sold part of its business to More Groceteria Limited. However, I disagree with my colleagues and would have dismissed the application.

2. The finding by the majority holds that Loblaws had sold a part of its business to More Groceteria Limited. The evidence led established that the Loblaws store was closed and a new “super store” was opened five miles away. All of the employees of Loblaws had been transferred to other Loblaws’ stores. More Groceteria Limited did not hire any Loblaws’ employees. It subleased the premises from Loblaws and acquired certain chattels and fixtures. While it is clear that the business of a supermarket was being carried on by More, I am of the opinion that the business was not transferred from Loblaws to More, but that More established a new business to compete with Loblaws.

3. As the majority notes, a purpose of section 55 of the Act is to provide some degree of permanence to collective bargaining rights. In this case, the bargaining rights of the Union have not been affected by the transaction since all of the employees have been employed by Loblaws pursuant to the seniority provision of the Loblaws collective agreement. Thus, the Union’s bargaining rights have been preserved. The finding by the Board in this case permits the trade union to acquire the bargaining rights for employees who have not had the opportunity to choose whether they wish to be represented by the applicant in collective bargaining. In my opinion, granting the Applicant the relief it seeks goes beyond the purpose and intent of section 55. The Board is extending the bargaining rights of the Applicant over new employees of More Groceteria by finding that Loblaws sold its business to More.

4. The establishment of a new Loblaws store and the transfer of employees to Loblaws other stores preserved the bargaining rights of the Applicant. More Groceteria did not, in my opinion, acquire the business of Loblaws but merely established a new parallel business to compete with Loblaws in the same general market area. For these reasons, I would dismiss this application.

1882-79-M In The Matter of a Reference from The Minister Of Labour to The Ontario Labour Relations Board under Section 127(4) Of The Labour Relations Act; and In The Matter of Certain Designations of Certain Employee and Employer Bargaining Agencies.

Bargaining Rights – Construction Industry – Reference – Carpenters’ Union and Lathers Union designated as separate employee bargaining agencies – Two unions merging – Whether separate designations necessary or appropriate – Whether merger affecting bargaining rights established by designations

BEFORE: George W. Adams, Chairman, Ron A. Furness, and Ian C. A. Springate, Vice-Chairmen and Board Members H. J. F. Ade and C. A. Ballentine.

APPEARANCES: *Donald F. O. Hersey and Frank Lavalle for Interior Systems Contractors*

Association of Ontario; Joseph Liberman and Fred Beldham for The Acoustical Association of Ontario; A. M. Minsky, N. LeBlanc and H. K. Weller for The Ontario Acoustical and Drywall District Council, the United Brotherhood of Carpenters and Joiners of America; Harold F. Caley and Robert Reid for Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America; B. W. Binning and Leo Howes for Labour Relations Bureau, Ontario General Contractors Association.

DECISION OF THE BOARD; April 9, 1980

1. This is a reference from the Minister of Labour to the Board pursuant to section 127(4) of *The Labour Relations Act*. Section 127 provides:

“(1) The Minister may, upon such terms and conditions as the Minister considers appropriate,

- (a) designate employee bargaining agencies to represent in bargaining provincial units of affiliated bargaining agents, and describe those provincial units;
- (b) notwithstanding an accreditation of an employers' organization as the bargaining agent of employers, designate employer bargaining agencies to represent in bargaining provincial units of employers for whose employees affiliated bargaining agents hold bargaining rights, and describe those provincial units.

(2) Where affiliated bargaining agents that are subordinate or directly related to different provincial, national or international trade unions bargain as a council of trade unions with a single employer bargaining agency for a province-wide collective agreement, the Minister may exclude such bargaining relationships from the designations made under subsection 1, and subsection 2 of section 133 shall not apply to such exclusion.

(3) Where a designation is not made by the Minister of an employee bargaining agency or an employer bargaining agency under subsection 1 within sixty days after this section comes into force, the Minister may convene a conference of trade unions, councils of trade unions, employers and employers' organizations, as the case may be, for the purpose of obtaining recommendations with respect to the making of a designation.

(4) The Minister may refer to the Board any question that arises concerning a designation, or any terms or conditions therein, and the Board shall report to the Minister its decision on the question.

(5) Subject to sections 128 and 129, the Minister may alter, revoke or amend any designation from time to time and may make another designation.

(6) *The Regulations Act* does not apply to a designation made under subsection 1.”

2. A request has been made to the Minister by the Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America for designation as the employee bargaining agency to represent in bargaining a provincial unit of affiliated bargaining agents. This reference concerns the structure of bargaining for employees engaged in the erection and installation of acoustics, drywall, lathing and related interior systems in the industrial, commercial and institutional sector of the construction industry. In the reference to the Board, the Minister has indicated that the parties referred to in the appearances have apprised the Minister of the following facts and the Minister has referred three questions to the Board:

“On January 30th, 1978, the Minister of Labour pursuant to section 127(1)(a) of *The Labour Relations Act* designated the Wood, Wire and Metal Lathers’ International Union, (hereinafter referred to as the ‘Lathers International’) and the Wood, Wire and Metal Lathers’ International Union, Local 562, (hereinafter referred to as ‘Local 562’) as the employee bargaining to represent in bargaining all journeymen and apprentice lathers represented by the Lathers International, or Local 562, or any other local of the Lathers International which in the future may be chartered to represent journeymen and apprentice lathers in the industrial, commercial and institutional sector of the construction industry. Attached herewith as Schedule ‘A’ to this Reference is a copy of the said designation.

On January 30th, 1978, the Minister of Labour pursuant to section 127(1)(b) of *The Labour Relations Act* designated the Interior Systems Contractors Association of Ontario, (hereinafter referred to as ‘VISCA’ as the employer bargaining agency to represent in bargaining a provincial unit of employers for whose employees the Lathers International, Local 562, or any other local of the Lathers International chartered to represent journeymen and apprentice lathers holds bargaining rights in the industrial, commercial and institutional sector of the construction industry. Attached herewith as Schedule ‘B’ to this Reference is a copy of the said designation.

On March 3rd, 1978, the Minister of Labour, pursuant to section 127(1)(a) of *The Labour Relations Act* designated the United Brotherhood of Carpenters and Joiners of America, (hereinafter referred to as ‘the Carpenters’) and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America, (hereinafter referred to as ‘the Ontario Provincial Council’) as the employee bargaining agency to represent in bargaining all journeymen and apprentice carpenters, other than millwrights, represented by the Carpenters, or the Ontario Provincial Council, or the Ontario Acoustical and Drywall District Council, or, inter alia, certain other affiliated bargaining agents including the United Brotherhood of Carpenters and Joiners of America, Local 1617, (hereinafter referred to as ‘Local 1617’), or any other local of the Carpenters which in the future may be chartered to represent journeymen and apprentice carpenters, other than millwrights, in the industrial, commercial and institutional sector of the construction industry. Attached herewith is Schedule ‘C’ to this Reference is a copy of the said designation.

On March 3rd, 1978, the Minister of Labour, pursuant to section 127(1)(b) of *The Labour Relations Act* designated the 'United Brotherhood of Carpenters and Joiners of America Employer Bargaining Agency' consisting of the Acoustical Association of Ontario, the Caulking Contractors Association of Ontario, the Labour Relations Bureau of the Ontario General Contractors Association, the Resilient Flooring Contractors Association of Ontario, and the Industrial Contractors Association of Canada as the employer bargaining agency to represent in bargaining a provincial unit of employers for whose employees the Carpenters, or the Ontario Provincial Council, or the Ontario Acoustical and Drywall District Council, or inter alia, certain other affiliated bargaining agents including Local 1617, or any other local of the Carpenters which in the future may be chartered to represent journeymen and apprentice carpenters, other than millwrights, holds bargaining rights in the industrial, commercial and institutional sector of the construction industry. Attached herewith as Schedule 'D' to this Reference is a copy of the said designation.

In 1979, the Carpenters and the Lathers International entered into an agreement of affiliation wherein the Lathers International agreed to affiliate with the Carpenters. Pursuant to the affiliation arrangement, on September 1st, 1979, the Carpenters issued a charter for Local 562L of the United Brotherhood of Carpenters and Joiners of America, (hereinafter referred to as 'Local 562L') with the understanding that Local 562L was the successor of Local 562. By reason of the said succession, Local 562L acquired the rights, privileges, duties, bargaining rights and jurisdiction formerly held by Local 562.

Local 1617 and Local 562L entered into merger arrangements. Effective January 1st, 1980, as a result of the said merger arrangements, the Carpenters issued a charter for Local 675 of the United Brotherhood of Carpenters and Joiners of America, (hereinafter referred to as 'Local 675').

The Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, requests the Minister of Labour to designate it as the employee bargaining agency to represent in bargaining all employees engaged in the erection and installation of acoustics, drywall, lathing and related insulation systems, represented by the Ontario Acoustical and Drywall District Council, United Brotherhood of Carpenters and Joiners of America, or any of its affiliated bargaining agents in the industrial, commercial and institutional sector of the construction industry. The Labour Bureau of the Ontario General Contractors Association and the Ontario Provincial Council have advised the Minister of their objection to the said request for designation.

NOW THEREFORE having regard to the circumstances outlined above and the request of the Ontario Acoustical and Drywall District Council, the Minister of Labour considers it advisable to refer the following questions to the Ontario Labour Relations Board pursuant to section 127(4) of *The Labour Relations Act*:

- (i) Is the designation by the Minister of Labour of the Lathers' International as the employee bargaining agency and the designation by the Minister of Labour of ISCA as the employer bargaining agency still effective in view of the affiliation and merger between the Lathers International and the Carpenters, and between Locals 562, 562L, 675, and 1617, particularly having regard to Schedules 'C' and 'D'?
- (ii) Notwithstanding the answer to question (i), is it appropriate to revise the said designation for employees engaged in the erection and installation of acoustics, drywall, lathing and related insulation systems represented by the Carpenters and for the employers of the said employees?
- (iii) If separate designations are appropriate, what parties should be represented in the said designations?"

3. Schedules "A", "B", "C" and "D" to the reference of the Minister are in the following form:

"Schedule 'A'

EMPLOYEE BARGAINING AGENCY DESIGNATION

Pursuant to clause *a* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c. 232, as amended, I hereby designate The Wood, Wire and Metal Lathers' International Union and The Wood, Wire and Metal Lathers' International Union, Local 562 as the employee bargaining agency to represent in bargaining all Journeymen and Apprentice Lathers, represented by the following affiliated bargaining agents:

- 1. The Wood, Wire and Metal Lathers' International Union; or
- 2. Local Union 562 of The Wood, Wire and Metal Lathers' International Union; or
- 3. any other Local of The Wood, Wire and Metal Lathers' International Union which in the future may be chartered to represent Journeymen and Apprentice Lathers,

(which Unions are hereinafter collectively referred to as 'the Unions'), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, bargaining as aforesaid in relation to bargaining rights of the Unions or any of them and the performance of work described in or covered by:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements between the Unions or any of them and any employers;

- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, the collective agreement made between Local 562 of The Wood, Wire and Metal Lathers' International Union and Interior Systems Contractors Association of Ontario,

and such similar or other collective agreements to which the Unions or any of them are party to or bound by.

'Bette Stephenson'
Bette Stephenson,
M.D.
Minister

January 30, 1978

Schedule "B"

EMPLOYER BARGAINING AGENCY DESIGNATION

Pursuant to clause *b* of subsection 1 of section 127 of The Labour Relations Act, R.S.O., 1970, c. 232, as amended, I hereby designate the Interior Systems Contractors Association of Ontario as the employer bargaining agency to represent in bargaining all employers whose employees are represented by the following affiliated bargaining agents:

1. The Wood, Wire and Metal Lathers' International Union, or
2. Local Union 562 of The Wood, Wire and Metal Lathers' International Union; or
3. any other Local of The Wood, Wire and Metal Lathers' International Union which in the future may be chartered to represent Journeymen and Apprentice Lathers,

(which Unions are hereinafter collectively referred to as 'the Unions'), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid, all employers bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the

Province of Ontario, and without limiting the generality of the foregoing, the collective agreement made between Local 562 of The Wood, Wire and Metal Lathers' International Union and Interior Systems Contractors Association of Ontario,

and such similar or other collective agreements to which the Unions or any of them are party to or bound by.

'Bette Stephenson'
Bette Stephenson,
M.D.
Minister

January 30, 1978

Schedule 'C'

EMPLOYEE BARGAINING AGENCY DESIGNATION

Pursuant to clause *a* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c. 232, as amended, I hereby designate the United Brotherhood of Carpenters and Joiners of America and the Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America as the employee bargaining agency to represent in bargaining all Journeymen and Apprentice Carpenters other than Millwrights, represented by the following affiliated bargaining agents:

1. United Brotherhood of Carpenters and Joiners of America; or
2. Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America; or
 - (1) the Carpenters District Council of Toronto and Vicinity, or the
 - (2) Lake Ontario District Council, or the
 - (3) Western Ontario District Council, or the
 - (4) Ontario Acoustical and Drywall District Council; or
3. the following Local Unions: 18, 27, 38, 93, 249, 397, 446, 494, 572, 666, 681, 785, 1071, 1133, 1256, 1304, 1316, 1450, 1617, 1669, 1747, 1946, 1963, 1988, 2041, 2050, 2222, 2451, 2466, 2480, 2482, 2486, 2965, 3227 or 3233 of the United Brotherhood of Carpenters and Joiners of America; or
4. any other Local of the United Brotherhood of Carpenters and Joiners of America which in the future may be chartered to represent Journeymen and Apprentice Carpenters other than Millwrights,

(which Council and Unions are hereinafter collectively referred to as 'the Unions'), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, bargaining as aforesaid in relation to bargaining rights of the Unions or any of them and the performance of work described in or covered by:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements between the Unions or any of them and any employers;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

'Bette Stephenson'
Bette Stephenson,
M.D.
Minister

March 3, 1978

Schedule "D"

EMPLOYER BARGAINING AGENCY DESIGNATION

Pursuant to clause *b* of subsection 1 of section 127 of The Labour Relations Act, R.S.O. 1970, c. 232, as amended, I hereby designate the United Brotherhood of Carpenters and Joiners of America Employer Bargaining Agency consisting of Acoustical Association of Ontario, Caulking Contractors Association of Ontario, Labour Relations Bureau of Ontario General Contractors Association, Resilient Flooring Contractors Association of Ontario and Industrial Contractors Association of Canada as the employer bargaining agency to represent in bargaining all employers whose employees are represented by the following affiliated bargaining agents:

- 1. United Brotherhood of Carpenters and Joiners of America; or
- 2. Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America; or
 - (1) the Carpenters District Council of Toronto and Vicinity, or the
 - (2) Lake Ontario District Council, or the
 - (3) Western Ontario District Council, or the

(4) Ontario Acoustical and Drywall District Council; or

3. the following Local Unions: 18, 27, 38, 93, 249, 397, 446, 494, 572, 666, 681, 785, 1071, 1133, 1256, 1304, 1316, 1450, 1617, 1669, 1747, 1946, 1963, 1988, 2041, 2050, 2222, 2451, 2466, 2480, 2482, 2486, 2965, 3227 or 3233 of the United Brotherhood of Carpenters and Joiners of America; or
4. any other Local of the United Brotherhood of Carpenters and Joiners of America which in the future may be chartered to represent Journeymen and Apprentice Carpenters other than Millwrights,

(which Council and Unions are hereinafter collectively referred to as 'the Unions'), in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and without limiting the generality of the foregoing, to represent in bargaining as aforesaid, all employers bound by or parties to:

- (a) certificates of the Ontario Labour Relations Board granted to the Unions or any of them;
- (b) voluntary recognition agreements with the Unions or any of them;
- (c) collective agreements to which the Unions or any of them have been or are party to or bound by, covering the industrial, commercial and institutional sector of the construction industry in the Province of Ontario.

This designation is subject to the condition that the employer associations which have formed the United Brotherhood of Carpenters and Joiners of America Employer Bargaining Agency shall file with my office an executed copy of a satisfactory constitution for the employer bargaining agency before April 30, 1978.

'Bette Stephenson'
Bette Stephenson,
M.D.
Minister"

March 3, 1978

4. The parties which appeared before the Board filed briefs and addressed argument to the Board with respect to the reference. A joint brief was filed by the Ontario Acoustical and Drywall District Council, the United Brotherhood of Carpenters and Joiners of America (the "OADWDC") the Interior Systems Contractors Association of Ontario (the "ISCA") and The Acoustical Association of Ontario (the "AAO"). The Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America (the "OPC") and the Labour Relations Bureau of the Ontario General Contractors Association (The "OGCA") filed separate briefs.

5. There is no real dispute among the parties on the facts which form the background to this reference. Prior to the mid-1960's, most interior walls were constructed of metal lath to which was applied two coats of plaster. Work connected with the preparation of the lath was performed by members of the lathing trade. The craft union pertaining to this trade was the Lathers' International. By 1970 the lath-plaster system had largely been replaced by metal furring components to which drywall board is attached. The skill of the lather could fairly easily be adapted to this new process and lathers in fact became actively involved in the installation of drywall. Lathers also became active in a related type of work, namely, the installation of acoustical ceiling systems. These systems generally involve the use of metal furring to which are attached finished panels or tiles. Throughout the 1970's most of the work performed by the lathers involved the installation and erection of drywall and acoustical ceiling systems.

6. In 1970 the Drywall Contractor Association of Ontario was formed to represent employers engaged in drywall and acoustic ceiling installation. On November 26, 1970, this Association voluntarily recognized Lathers' Local 562 as bargaining agent for those employees of Association members who were engaged in the installation of drywall and acoustic ceiling systems. On August 15, 1972 the Drywall Contractor Association of Ontario merged with the Metropolitan Lathing Contracting Association, an association of lathing contractors. Resulting from this merger was the formation of ISCA. On April 30 1974, ISCA entered into a province-wide collective agreement with Lathers' Local 562 covering tradesmen engaged in the erection and installation of acoustics, drywall and lathing in both the residential sector and industrial, commercial and institutional sector of the construction industry. On April 30, 1977 the same parties entered into a new collective agreement which by its terms is effective from that date until April 30, 1980.

7. The Lathers were not the only tradesmen to work on the installation and erection of drywall and acoustical systems. Carpenters represented by the United Brotherhood of Carpenters and Joiners of America ("the United Brotherhood") were also working in this field. Although some of the work was, and still is, performed by general carpenters, much of the work came to be performed by members of the United Brotherhood who engaged exclusively in this type of work. In 1963 the United Brotherhood chartered Local 1747 as a specific drywall and acoustic local for the Toronto area. In the ensuing rivalry between the United Brotherhood and the Lathers' International for acoustic and drywall work, the United Brotherhood benefited from the movement of a number of lathers away from the Lathers' International into the United Brotherhood. It appears that in 1971 the great majority of members of Lathers' Local 423 in Ottawa joined the United Brotherhood and were included in a newly chartered local, Local 2041. This local was specifically formed to represent tradesmen engaged in lathing, drywall and acoustic ceiling work. In 1973 members of the Lathers' Local in London joined the United Brotherhood and they likewise were included in a new drywall and acoustic local, namely, Local 1316. In the same year the majority of the members of Lathers' Local 97 of approximately two hundred and fifty tradesmen joined the United Brotherhood's Local 1747, the existing drywall and acoustic local of the United Brotherhood. In 1974 the United Brotherhood chartered Local 1617 out in Barrie, but covering the Metropolitan area. This Local appears to have replaced Local 1747 as the drywall and acoustic local in and around Metropolitan Toronto.

8. In 1972 the OPC entered into a collective agreement with the AAO, an association of employers engaged in the drywall and acoustic industry. Some nineteen Ontario

locals and district councils of the United Brotherhood agreed to be bound to this agreement for drywall and acoustic work. On January 1, 1975 the United Brotherhood chartered the OADWDC which was comprised not only of the three drywall and acoustic locals in Toronto, Ottawa and London, but also of a number of "mixed" locals, that is to say, locals whose members performed not only general carpentry work but also caulking, resilient floor work and drywall and acoustic work. The OADWDC entered into two successive collective agreements with the AAO, the first covering the period of May 1, 1975 to April 30, 1977, the second covering the period of May 1, 1977 to April 30, 1978.

9. In 1977, *The Labour Relations Act* was amended to provide for a system of province-wide bargaining in the industrial, commercial and institutional sector of the construction industry. (*The Labour Relations Amendment Act, 1977*, S.O. 1977, c 31) On January 30, 1978, the Minister of Labour designated the Lathers' International Union and Lathers' Local 562 as the employee bargaining agency to represent lathers in collective bargaining. On the employer side the Minister designated ISCA as the corresponding employer bargaining agency. On March 3, 1978 the Minister made the appropriate designations with respect to the United Brotherhood. The United Brotherhood and its OPC were designated as the relevant employee bargaining agency, while some five employer associations, including the AAO, were together designated as the employer bargaining agency. The OADWDC, as well as the individual locals belonging to the Council, were expressly covered by these carpenter designations.

10. Pursuant to the scheme of province-wide bargaining, the OPC of the United Brotherhood and the carpenters employer bargaining agency entered into a provincial collective agreement which is in effect from September 6, 1978 until April 30, 1980. Attached to the collective agreement are three appendices, namely, a caulking workers' appendix, a resilient floor workers' appendix and an acoustic and drywall workers' appendix. The acoustic and drywall workers' appendix sets out working conditions and wages for members of locals affiliated to the OADWDC when employed by acoustic and drywall contractors. It should be noted that when general contractors who are bound to the carpenters' provincial agreement perform their own drywall and acoustic work, the work is generally performed by members of a "mixed" local under the general provisions of the carpenters' collective agreement, as opposed to the terms set out in the acoustic and drywall workers' appendix.

11. On April 13, 1979, the United Brotherhood and the Lathers' International entered into an agreement whereby the Lathers' International would become affiliated with the United Brotherhood. On September 1, 1979, the United Brotherhood issued a charter to the former Lathers' Local 562, and it became Local 562L of the United Brotherhood. This Local in turn merged with Local 1617, the Barrie-Toronto drywall and acoustic local of the United Brotherhood, to become a new local, namely, Local 675. Local 675 is a member of the OADWDC and, as such, is one of three locals with the OADWDC comprised only of acoustic and drywall workers. As previously indicated, most of the locals belonging to the OADWDC are "mixed" locals.

12. The erection and installation of acoustics, drywall, lathing and related interior systems in the industrial, commercial and institutional sector of the construction industry is included within the scope of the collective agreement between the OPC and the carpenters' employer bargaining agency and, in particular, the acoustic and drywall workers' appendix thereto. The erection and installation of acoustics, drywall, lathing and related interior sys-

tems falls within the generally recognized jurisdiction of the United Brotherhood and is included within the training programme for apprenticeship for both the general carpenters and the lathers. The work performed by former members of the Lathers' Local 562 is identical with the work described in the acoustic and drywall workers' appendix of the collective agreement between the OPC and the carpenters' employer bargaining agency. The affiliation of the Lathers' International with the United Brotherhood has not brought any new or different skills into the United Brotherhood.

13. In Ontario, not only do employers who are general contractors perform the erection and installation of acoustics, drywall, lathing and related interior systems in the industrial, commercial and institutional sector of the construction industry, but members of mixed locals of the United Brotherhood also perform this work both for the general contractors and subcontractors. Prior to the existence of the statutory scheme for province-wide bargaining in the industrial, commercial and institutional sector of the construction industry, in many of the collective agreements of councils and locals of the United Brotherhood the erection and installation of acoustics, drywall, lathing and related interior systems was specifically enumerated as the work of carpenters.

14. Millwrights' locals of the United Brotherhood have bargained with the Association of Millwright Contractors for approximately eighteen years on a province-wide basis. During this period the millwrights' work of installing machinery has never been covered by the terms and conditions of the various other collective agreements of councils and locals of the United Brotherhood throughout Ontario. There is little or no interchange between carpenter members and millwright members of the United Brotherhood.

15. Subsequent to the affiliation of the Lathers' International with the United Brotherhood, the OADWDC requested the Minister to designate it as an employee bargaining agency to represent in bargaining employees engaged in the erection and installation of acoustics, drywall, lathing and related interior systems. The OADWDC in effect desires to bargain on behalf of both former lathers and other members of the United Brotherhood belonging to the OADWDC when they are engaged in acoustic and drywall work. This request is supported by ISCA and AAO. On the other hand, the OGCA and the OPC have requested the Minister to include the former lathers and other members of the United Brotherhood belonging to the OADWDC as part of one expanded designation which is currently expressed as Schedules "C" and "D".

16. The OPC initially raised objection to the power of the Minister to amend and revoke any designation under section 127. There is no merit in this objection. Section 127(5) clearly gives the Minister the power to alter, revoke or amend any designation subject to the provisions of sections 128 and 129. While the Minister has the power set forth in section 127(5) he also has the power under section 127(4) to refer to the Board any question that arises concerning a designation or any terms or conditions therein. The Minister may exercise a general supervisory role under section 127 subject to the provisions of sections 128 and 129. There was nothing before the Board which indicated that any applications under either section 128 or section 129 had been filed with the Board. The Board finds that there is no provision of the Act which restricts the power of the Minister to exercise his discretion under section 127.

17. The OADWDC argued that employers and employees who perform the work in

question are entitled to a separate set of designations apart from a set of designations for general carpentry work. The OADWDC advanced the proposition that one of the criteria for such separate sets of designations is a history of separate collective bargaining between different parties and referred to the language of section 127(1)(a)(b) in support of this proposition. Reference was made to the length of such separate collective bargaining. The OADWDC also argued that a second criterion was the existence of separate skills and trade or work and whether there are differences in their training. As a third criterion it was argued that consideration should be given to the aspect of labour relations. The freedom of associations set forth in sections 3 and 4 of the Act was referred to and it was argued that the placing of different bargaining interests under one set of designations on a province wide basis was contrary to the wishes of the OADWDC. The Board was urged to read the Act in terms of free choice wherever possible. The OADWDC pointed out that since 1975 the Board had determined appropriate bargaining units for locals of the Lathers' International under the provisions of section 6(1) of the Act with respect to the work in question and argued that while such bargaining units were not craft bargaining units it was a significant change. It was pointed out that separate sets of designations existed with respect to the Labourers' International Union of North America with respect to the performance of pre-cast concrete work and it was argued that this reflected the separate history of bargaining in the performance of pre-cast concrete work. The OADWDC informed the Board that it was not interested in sustaining the set of designations referred to in the first question posed by the Minister and adopted the position that if such designations were still in effect they would have only a technical existence. However, the OADWDC argued that that set of designations would be effective until revoked.

18. The AAO informed the Board that the set of designations referred in the first question posed by the Minister was no longer effective. The AAO compared the circumstances of 1980 with the circumstances of 1978 when the designations were initially made and pointed out that in 1980, unlike 1978, there is now a viable and strong acoustic and dry-wall industry under one house with groups of employers who engaged in this industry. It was argued that unless two separate sets of designations were made there would be conflict due to the composition of the employee and employer bargaining agencies, conditions of work, mobility of manpower and labour relations culminating in unsatisfactory collective bargaining. The AAO pointed out that since two separate sets of designations were in existence it could not be said that two different sets of designations would cause an undue separateness or fragmentation which did not already exist.

19. The ISCA adopted a basic approach with respect to the first question posed by the Minister and stated that section 54 of the Act would clearly take precedence over the schedules to the reference. The ISCA argued, however, that such a conclusion did not make too much sense because it would not be a workable scheme of collective bargaining to have the trade unions who represent the employees who perform the work in question in two separate sets of designations. The Board was urged not to follow a strictly legal interpretation with respect to the first question. The ISCA made reference to the problems, goals and solutions set forth in the Report of The Industrial Inquiry Commission into Bargaining Patterns in the Construction Industry (the Franks Report) dated May 10, 1976. While the Board may look at that report in order to see what was the mischief at which the amendment to the Act in 1977 in *The Labour Relations Amendment Act, 1977*, S.O. 1977, c. 31, was aimed, we may not look at what the report recommended. In *Letang v. Cooper*, [1965] 1 Q.B. 232, Lord Denning, M.R. at page 240 expressed in this way:

“It is legitimate to look at the report of such a committee [the Tucker Committee on the Limitation of Actions] ‘so as to see what was the mischief at which the Act was directed. You can get the facts and surrounding circumstances from the report so as to see the background against which the legislation was enacted. This is always a great help in interpreting it. But you cannot look at what the committee recommended, or at least, if you do look at it, you should not be unduly influenced by it. It does not help you much, for the simple reason that Parliament may, and often does, decide to do something different to cure the mischief.’”

The wisdom of this approach is demonstrated by the changes that were made to the various forms of the Bill which subsequently became *The Labour Relations Amendment Act, 1977*, S.O. 1977, c. 31.

20. In one important respect the ISCA disagreed with the position of the OADWDC on the concept of the importance of a craft or trade. It was the position of the ISCA that crafts and trades come and go, are modified and disappear. The Board was urged to approach this reference that the concept of craft and trade is unimportant and that what is important is whether there is an area of speciality and whether there are identities which are in existence and which will continue to be in existence in this area of the construction industry. The ISCA referred to examples in the work of painting where areas such as taping were negotiated by the ISCA and the AAO separate and apart from the Painting Contractors' Association. The Board was asked to recommend to the Minister that the ISCA and the AAO should be included under the existing designation with the ISCA and the OADWDC as a successor under section 54.

21. The OGCA posed a series of assumptions and the Board was asked to assume that by operation of section 54 Local 562L of the United Brotherhood became the successor to Lathers' Local 562 and then Locals 562L and 1617 of the United Brotherhood merged into Local 675 of the United Brotherhood. The Board was also asked to assume that the provisions of section 54 had been complied with. The OGCA reasoned that the designations contained in Schedules “C” and “D” would pick up both Local 675 of the United Brotherhood and employers who were originally bound by the collective agreement with Lathers' Local 562. In this way, the OGCA reasoned, the designations referred to in the first question posed by the Minister would be without any parties and, while not operative, would not lapse and such employers and Local 675 of the United Brotherhood would be bound by the sets of designations referred to in Schedules “C” and “D”. Upon being questioned by the Board on the legal basis for this result, the OGCA was unable to satisfactorily explain how employers opposed to trade unions could be affected by section 54.

22. The OGCA pointed to the existence of mixed locals in Schedules “C” and “D” and argued that if such locals were to be included in a separate set of designations there would be a great deal of duplication. The OGCA argued that the chief criterion in section 125 is the definition of affiliated bargaining agent in section 125(a) and that section 125(a) was not directed to criteria but rather is directed towards whether or not a bargaining agent represents employees who commonly bargain separately and apart from other employees. The OGCA adopted the position that the work in question is not a separate trade but is rather a classification within the general trade of carpentry. It was stressed that under the collective agreement between the OPC of the United Brotherhood and the carpenters' em-

ployer bargaining agency the rates for general carpentry work and the work in question are generally the same. It was also argued that millwrighting is classified as a specialized skill in that not all carpenters are able to perform the work of a millwright and that therefore it should be regarded as virtually a separate trade. The OGCA argued that the community of interest of the OPC and the OADWDC are so close that it made good sense to have them negotiate within the same set of negotiations.

23. The OGCA raised the spectre of jurisdictional disputes if two sets of designations were created and argued that the positive effects of the affiliation would be in large part nullified. The possibility of restraint of trade was referred to as arising if two sets of designations were created and it was argued that all employers which performed the work in question should be competing on the same labour cost basis. The OGCA predicted that separate collective agreements would inevitably lead to one group of employers securing more favourable conditions than another group. The OGCA stressed that to create two sets of designations would be a dangerous precedent and would invite similar requests from other groups within the bargaining framework of the United Brotherhood, the Labourers' International Union of North America and other comprehensive designations.

24. The OPC opened its argument by emphasizing that the OADWDC would not indicate the geographic jurisdiction of Local 675 and that if the geographic jurisdiction of Local 675 is province-wide then jurisdictional conflicts would arise in the future. The OPC stressed that it is the carpenters who under sections 6(2) and 125(a) according to established trade union practice in the construction industry and not the employees who perform the work in question commonly bargain separately and apart from other employees. It was pointed out that the employees who perform the work in question are usually included by the Board in appropriate bargaining units determined under section 6(1) rather than constituting craft bargaining units determined under section 6(2). The OPC argued that there would be no infringement of sections 3 and 4 of *The Labour Relations Act* under a single set of comprehensive designations and that if a separate designation for drywall, acoustics, etc. was in existence section 3 could be infringed with respect to members of mixed locals.

25. The OPC characterized the conduct of the OADWDC as an attempt to expand its jurisdiction in the guise of requesting a separate set of designations. It was the position of the OPC that most of the designations under section 127 were expressed in terms of trades, such as, for example, carpenters and electricians and that peace and stability would be best served under a single set of designations. The OPC viewed the possibility of two sets of designations as a fragmentation in that it would create two trades in carpentry and pointed to the existence of thirty-one mixed locals, a caulking local, a resilient floor layers' local and the Ontario Acoustical and Drywall District Council and under the umbrella of the collective agreement between the OPC of the United Brotherhood and the carpenters' employer bargaining agency. The OPC pointed out that it had permitted the Ontario Acoustical and Drywall District Council to negotiate a separate appendix covering the work in question. The OPC also expressed its opinion that two separate sets of designations would create the potential for jurisdictional disputes of great magnitude.

26. The OPC adopted the position that bargaining rights had not been transferred under section 54 because the formalities required under that section had not been observed. The fear was expressed that if two sets of separate designations were in existence the general contractors would cease bargaining with respect to members of mixed locals who perform

the work in question and that these members would not be able to perform such work. This also gave rise to the fear that the OPC would then be unable to protect the work in question for all carpenters in Ontario under article 4.01 of the collective agreement between the OPC of the United Brotherhood and the Carpenters' employer bargaining agency. It was pointed out that section 136 provided protection for affiliated bargaining agents and employers in that it prohibited a designated employee bargaining agency and a designated employer bargaining agency from acting in a manner that is arbitrary, discriminatory or in bad faith in the representation of affiliated bargaining agents and employers in the provincial unit of employers. The separate set of designations for millwrights was distinguished by the OPC on the grounds that millwrights had bargained separately for eighteen years and had never been covered by other collective agreements by the United Brotherhood throughout Ontario.

27. It was the position of the OPC that the answer to the first question posed by the Minister should be that the designation was not effective and should be revoked. The OPC argued that Locals 562L and 675 of the United Brotherhood were automatically caught by the designation and that this has made the description of lathers redundant. With respect to the second and third questions, the OPC submitted that the designations in Schedules "A" and "B" should not be revised and that all affected affiliated bargaining agencies and employers' organizations should be added to the designations set forth in Schedules "C" and "D".

28. This reference from the Minister arises from the consequences of the affiliation of the Lathers' International Union with the United Brotherhood. Prior to the affiliation, locals of the Lathers' International Union and the United Brotherhood had been engaged in different sets of negotiations with different groups of employers. Although locals of the Lathers' International Union and the United Brotherhood had each negotiated and concluded separate collective agreements which covered employees who performed the work in question, in our opinion, it was the reality of the existing collective bargaining relationships between locals of two international trade unions and two different groups of employers which necessitated the creation of two separate sets of designations for province-wide collective bargaining in the industrial, commercial and institutional sector of the construction industry.

29. The affiliation of the Lathers' International Union with the United Brotherhood has had a considerable and a positive affect on labour relations in the construction industry in Ontario. In the years prior to the affiliation, locals of these two international unions were frequently engaged in seeking to represent the same bargaining unit of employees. See, for example, the *Volens Contractors Ltd.* case, (Board File No. 0444-75-R, unreported decision of the Board dated August 28, 1975); and the *C. Strauss (1973) Limited* case, [1975] OLRB Rep. July, 581. Jurisdictional disputes occurred on many occasions between locals of these two international unions and complaints were filed with the Board under section 81 of the Act. See, for example, the *Donaldson-Barron Limited and Suburban Lathing & Acoustics Ltd.* case, (Board File No. 0020-79-JD, unreported decision of the Board dated June 1, 1979); the *Gryd Construction Inc., The Manufacturers Life Insurance* case, [1975] OLRB Rep. Mar. 230; the *Northdown Drywall & Construction Ltd.* case, (Board File No. 2207-72-JD, unreported decision of the Board dated July 11, 1972); the *Northdown Drywall & Construction Ltd.* case, (Board File No. 2334-72-JD, unreported decision of the Board dated September 13, 1972); the *Ellis Don Ltd.* case (Board File No. 1423-71-JD, unreported deci-

sion of the Board dated March 14, 1972); the *Northdown Drywall & Construction Ltd.* case, (Board File No. 1411-71-JD, unreported decision of the Board dated June 28, 1972); the *Northdown Drywall & Construction Ltd.* case, (Board File No. 1305-71-JD, unreported decision dated February 3, 1972); the *Marel Contractors* case, (Board File No. 18434-70-JD, unreported decision of the Board dated November 20, 1970); and the *Vero Forms Ltd.* case, (Board File No. 15507(a)-68-JD, unreported decision dated July 7, 1969). Unlawful strikes occurred in situations which involved conflict between locals of these two international unions and applications were filed with the Board under section 123 of the Act. See, for example, the *Carpenters Local 38, Arthur J. Varty and Larry Beaudoin* case, (Board File No. 0382-77-U, unreported decision dated June 7, 1977); the *United Brotherhood of Carpenters and Joiners of America, The Carpenters District Council of Toronto and Vicinity* case, (Board File No. 0226-75-U, unreported decision dated May 12, 1975); the *United Brotherhood of Carpenters and Joiners of America, The Carpenters District Council of Toronto and Vicinity, William Johnston and P. Robichaud* case, (Board File No. 5653-74-U, unreported decision dated May 14, 1974); the *United Brotherhood of Carpenters and Joiners of America Local 1256, Donald Looocks and Jack Piggot* case, (Board File No. 5942-74-U, unreported decision dated July 15, 1974); the *United Brotherhood of Carpenters and Joiners of America, Local 38 and W. Hague* case, (Board File No. 7438-74-U, unreported decision dated March 18, 1975); the *United Brotherhood of Carpenters and Joiners of America, Local 1946, and David Noble* case, (Board File No. 4081-73-U, unreported decision dated July 25, 1973); and the *United Brotherhood of Carpenters and Joiners of America, Local 18, and J. Tarbutt* case, (Board File No. 5178-73-U, unreported decision).

30. In some respects the affiliation reflects the general trend of legislation with regard to labour relations in the construction industry in Ontario. This general trend is one of the consolidation of bargaining rights and, effectively, commenced in 1962 with the legislative directive to determine appropriate bargaining rights with reference to a geographic area and not with reference to a particular project. In 1970 the scheme of accreditation was introduced into the Act designed as it was to support the wider-area bargaining patterns that had evolved in the construction industry over time. See Goldberg and Crispo, *Construction Labour Relations* (1968) at page 376. The introduction of province-wide bargaining in 1977 in the industrial, commercial and institutional sector of the industry presently represents the most significant legislative initiative aimed at consolidating and rationalizing bargaining rights.

31. While no particular pattern in support of separate designations is discernable from a review of all the designations made pursuant to section 127, they do reflect, to a greater or lesser degree, pre-existing bargaining patterns and do not always correspond to what may be perceived as craft or trade lines. However, this claim for two separate sets of designations is one centred of self-interest and, thus, is a claim which may be made by other groups of trade unions and employers currently part of more comprehensive designations. Indeed, counsel to ISCA agreed that the issue before the Board was not particularly unique and that other groups should also be able to seek separate designations. But, in the fact of an overwhelming trend toward the consolidation of bargaining situations, a queue of additional requests for separate designations would be somewhat anomalous and not easily adjudicated because of the absence of meaningful criteria. Thus, the question of balancing and reconciling the claims based upon self-interest by groups of trade unions and employers against the viability and aspirations of larger and more divergent employee bargaining agencies and employer bargaining agencies poses a real dilemma at this point in time. It is our view that

this balancing must have regard to the reality of the pattern of bargaining and the more general drift to consolidation. As the Board stated in the *United Brotherhood of Carpenters & Joiners of America* case, [1978] OLRB Rep. August 776 at pp. 782-3:

“A reading of the provisions of the Act establishing provincial bargaining indicates that the Legislature intended the foundation of provincial bargaining to be pre-existing local bargaining rights. Section 127(1)(b) clearly provides that the employer bargaining agency is to represent only those employers ‘for whose employees affiliated bargaining agents hold bargaining rights’. The bargaining obligation of these employers then vest in the employer bargaining agency by operation of section 131. On the union side, the bargaining rights of the affiliated bargaining agents, by operation of section 130, vest in the employee bargaining agency designated under section 127(1)(a) of the Act. The legal result is simply a consolidation in the bargaining agencies of those bargaining rights and obligations existing at the time of designation.”

32. The Board is in agreement with the ISCA with respect to the importance of craft or trade in the designation of employee bargaining agencies. The Board agrees that trades come and go, are modified and disappear. In the context of this reference it may be pointed out the names of the Lathers’ Union and the United Brotherhood illustrate the impermanence of craft or trade. The name “The Wood, Wire and Metal Lathers’ International Union” chronicles the changes in construction materials and methods of construction since that union’s formation. Similarly, the name “The United Brotherhood of Carpenters and Joiners of America” reminds us that the craft or trade of joinery as long since disappeared as a recognized and separate craft or trade.

33. The Board in determining appropriate bargaining units of employees who perform the work in question has not defined such bargaining units as craft units pursuant to section 6(2) of the Act but has rather defined such bargaining units as appropriate bargaining units pursuant to section 6(1). The Board has not stated in any of its decisions that the employees who perform the work in question are a separate craft or trade. The reason why the Board has determined appropriate bargaining units pursuant to section 6(1) and not section 6(2) was to avoid describing the employees who perform the work in question as either lathers or carpenters and thereby avoiding the conversion of applications for certification into jurisdictional disputes. The fact that representatives of the United Brotherhood sat on opposite sides of the table before the Board and vigorously advocated either one or two sets of designations gives cause for concern that if there were two sets of designations the opportunity for jurisdictional disputes might well arise. In the past jurisdictional disputes have occurred between two locals of the same international trade union. In this regard reference may be had to the *J. R. Seguin et Fils Ltd.* case, (Board File No. 1178-76-JD – unreported decision dated June 28, 1977).

34. The first question posed by the Minister refers to whether the employee bargaining agency and the employer bargaining agency set forth in Schedules “A” and “B” are still effective. None of the parties presented a detailed analysis of the operation of section 54 of the Act to the known facts surrounding the affiliation of the Lathers’ International Union with the United Brotherhood, the consequent disappearance of some local unions and the appearance of new local unions. The fact that the United Brotherhood has chartered a new Local 675 means that such local falls into the general catch-all clause of the designation of

Schedule "C". Another argument may be made that following the affiliation there was a flow through of rights to Local 675 that the Lathers' unions possessed under the designation in Schedule "A". The parties, however, interpreted the first question as a question concerning industrial relations and not as a question which required the word "effective" to be examined and given a legal meaning. Even though the designations set forth in Schedules "A" and "B" might have a technical existence and would therefore be effective until revoked, such designations neither reflect the existing realities of the bargaining relationships nor serve any meaningful purpose by their continued existence.

35. It is the Board's opinion that the preferable interpretation of the impact of the merger on the designations contained in Schedules "A" and "B" is that these designations are no longer effective in either a legal or an industrial relations sense.

36. Section 127 provides the Minister with power to designate employee and employer bargaining agencies for provincial units of affiliated bargaining agents and with power to describe such provincial units. Schedules "A" to "D" are the result of exercises of these powers and, in our opinion, the "basket clause" found in paragraph 4 of Schedules "C" and "D" explicitly provide for the containment of all bargaining rights held by the newly chartered local, Local 675. We are not of the view that section 54 operates to transfer the status of the employee bargaining agency from Local Union 562 of The Wood, Wire and Metal Lathers' International Union to Local 675 of the Carpenters Union. The rights and obligations of one designation must be read in conjunction with other designations. Where the designations themselves provide for the allocation of bargaining authority through the description of provincial units of employees and employers, we are of the view that there is no right, privilege, or duty under the Act arising from a designation to acquire within the meaning of section 54. Thus, when Schedules "A" and "C" are read in the light of the subject merger, one sees that the trade unions mentioned in Schedule "A" no longer exist in name and the newly chartered local which acquired the primary rights and obligations described in paragraphs (a), (b) and (c) of Schedule "A" is one that falls within Schedule "C". Schedule "A" is no longer of any effect and should, therefore, be revoked. Similarly, all employers whose employees are represented by this same affiliated bargaining agent covered by Schedule "C" are now subject to the Schedule "D" designation and, thus, Schedule "B" is no longer of any effect and should be revoked. Finally, even if the foregoing was not the legal effect of the merger, Schedules "A" and "B" are ineffective designations in an industrial relations sense because of the history of overlapping jurisdiction between the two sets of designations which the subject merger was obviously intended to eliminate. Accordingly, the answer of the Board to the first question is "No."

37. With regard to the second question, we are not of the opinion that two sets of designations are either appropriate or justifiable in the circumstances. Many of the arguments addressed to the Board were based upon a high degree of "speculation" as to what may happen if two separate sets of designations are not maintained by the Minister. The Board is not persuaded that "restraint of trade" or other undesirable commercial side effects are contingent on the number of sets of designations. Similarly, the Board does not accept that the freedoms which are set forth in sections 3 and 4 are infringed by the number of sets of designations. The effect of such designations is not to deprive any person of his freedom to join a trade union or an employer's organization of his own choice. We are also of the view that the history of separate bargaining is only one factor to be considered in deciding the appropriateness of one or two sets of designations and that, in any event, the history of bargaining

associated with Lathers' Local 562 is not a substantial one in relative terms, clearly distinguishing it from the history underlying the separate millwrights designations. Finally, sections 125 and 127 of the Act do not impose a criterion of separate skill and trade or work in the designation of employee bargaining agencies or employer bargaining agencies and, therefore, the various submissions on this aspect of the work in question cannot be determinative. What is determinative is the fact of the merger; the trend in the construction industry towards the consolidation of bargaining situations; and the evidence in this case establishing that all parties before the Board are capable of working harmoniously together within the context of a single set of designations. Accordingly, it is our view that both the carpenters and the former members of Lathers' Local 562 who perform the work in question should be included within the same employee bargaining agency designation. The corresponding employer organizations should also bargain together under one designation. The answer to the second question posed by the Minister is, therefore, "Yes." In our opinion it is desirable to revise the set of designations referred to in the first question by revoking the designations set forth in Schedules "A" and "B" and by the specific addition to Schedule "D" of ISCA, together with all incidental changes necessary to effect the purpose of this recommendation.

38. Because we are of the opinion that separate designations would not be appropriate, the third question does not require an answer.

1423-79-M United Brotherhood of Carpenters and Joiners of America, Local 785, Applicant, v. **Vic Starchuk & Associates Inc.**, Respondent, v. Employer Bargaining Agency, Intervener.

Collective Agreement – Section 112a – Agreement signed on behalf of employer by person without actual signing authority – Signatory holding himself out as having authority – Subsequent conduct consistent with being bound by collective agreement – Agreement binding on employer

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. D. Bell and C. Ballentine.

APPEARANCES: *D. J. Wray, S. Koehler and E. Arsenault for the applicant; J. A. Ferenbach for the respondent; S. Harrington for the intervener.*

DECISION OF THE BOARD; April 21, 1980

1. The applicant has referred to the Board a grievance in the construction industry for arbitration under section 112a of *The Labour Relations Act*. The applicant is alleging that the respondent has violated certain clauses of the current provincial collective agreement between the carpenters employer bargaining agency and the Ontario Provincial Council, United Brotherhood of Carpenters and Joiners of America to which the applicant is bound. At the hearing the respondent denied that it was bound to that agreement or any other collective agreement with the applicant and claimed that the applicant did not hold any bargaining rights for employees of the respondent. Thus, before the Board has jurisdiction to hear the merits of the grievance, the applicant must establish that the respondent is

bound to the provincial collective agreement. This decision deals with that threshold issue and the parties have agreed that, should the Board find the respondent to be bound to that agreement, they will meet and attempt to settle the grievance.

2. The opposing positions of the two parties may be summarized as follows. The applicant contends that it entered into a collective agreement with the respondent in November 1974 and that the bargaining rights established thereby have continued uninterrupted to the date of this grievance. The applicant further contends that the respondent's actions since the signing of that agreement have affirmed the collective bargaining obligations between them. While the respondent denies that it ever entered into a collective agreement with the applicant, it acknowledges that from time to time for a period of approximately three years beginning in November 1974, it did hire members of the applicant by referral from it and, as directed by the applicant, did pay wage rates, deduct and remit union dues and make remittances to welfare trust funds and to the employers' association that was in a collective bargaining relationship with the applicant. The respondent's owner, Vic Starchuk, maintains that it was his understanding he could employ members of the applicant when he needed union carpenters, as long as he paid the wages, deducted union dues and made the remittances required by the applicant, and from other sources when he did not need union carpenters. Starchuk's understanding may, at first, appear naive. It is not unknown in the construction industry, however, for a trade union to supply members to an employer in the absence of any collective agreement or bargaining rights on just the conditions referred to by Starchuk. It is not uncommon for the Board to have a party before it relying on a practice of observing the terms of a collective agreement when attempting to establish that it is bound by or a party to a collective agreement. The Board has found that the mere observance by one party of the terms of a collective agreement does not bind that party to the agreement. See for example the Board's comments in *Ecodyne Limited*, [1979] OLRB Rep. July 629, particularly paragraph 28. The central issue before the Board in the instant case, then, is whether the document which the applicant states was executed between it and the respondent in November 1974 is a collective agreement as contended by the applicant. If it is, then the evidence before the Board would establish that the bargaining rights created at that time were still in existence at the date of this application. If it is not, the applicant has no bargaining rights for persons employed by the respondent.

3. The Board heard a substantial amount of evidence from ten witnesses. While some of it was incidental to the central issue and while there were problems of credibility with some of the witnesses (in part a result of the five-year lapse of time between the critical event and the hearing into this application), the findings of fact herein reflect the Board's assessment of the witnesses' recall of events, their demeanor and relative credibility. In a few instances herein where the Board has noted contradictions in the evidence, the Board has set out in its conclusions how it has viewed those contradictions.

4. The respondent has been in business since 1972, as a project manager in construction involved with designing, constructing and decorating buildings and their interiors from the acquisition of land until the property is turned over to the tenants. It was incorporated in its present name and form in 1976. Prior to that it operated as a registered proprietorship in the name of Vic Starchuk and Associates. This was its business format in November 1974 when the respondent was engaged in the design and installation of store interiors in Farmers' Market Square shopping mall in Kitchener, Ontario. It had finished three stores and was working on a fourth in November when Stephen Koehler, business representative of the

applicant, visited that job on which two of the applicant's members were employed. The two carpenters had just been laid off by the general contractor on the job site and had been hired to work for the respondent for a week by Charles Brohman, the respondent's representative on the store job. Koehler testified that he told Brohman that it would be necessary for the respondent to sign an agreement with the applicant if the two members were to continue to work for the respondent on that project. When Brohman told him that would not be a problem, Koehler queried whether he had the authority to sign an agreement. Brohman said that he would check with his office. When Koehler returned half an hour later, he was advised by Brohman that he had authority to sign an agreement and if Koehler had one there he would sign it. Brohman and Koehler signed several copies of two documents which were:

- (a) the collective agreement between the General Contractors Section of the Kitchener-Waterloo Construction Association and The Grand River Valley District Council of the United Brotherhood of Carpenters and Joiners of America; and
- (b) a non-member participation agreement between the respondent and the trustees of the Vacation Pay Trust established under the collective agreement.

While both documents bear signing dates of May 1, 1974, it is undisputed that they were not signed on that date but were, instead, signed during November 1974. Since the Association had been accredited on May 21, 1974 by the Board in respect of its bargaining relations with the Council, any employer in respect of which the Council or one of its affiliates obtained bargaining rights after that date would become bound pursuant to section 116(4) of the Act to the collective agreement between the Association and the Council, the reason for dating the document May 1, 1974 is not relevant to the central issue with which the Board is dealing. The first document is the collective agreement which the applicant contends established its bargaining rights in respect of carpenter employees of the respondent and on which it is relying for its right to pursue the grievance which is before the Board. The second document is an agreement to pay into a vacation pay trust fund established by the collective agreement which employers who are bound to the latter agreement and are not members of the Association are required to sign.

5. Brohman recalls the signing of the documents but stated that he thought he was just signing an agreement that the two carpenters would be paid the proper wages and benefits while on the store job. Brohman claims that Koehler told him everything would be satisfactory if that was done and if he signed an agreement right then, the two carpenters could stay on the job. He maintains that he did not read the documents before signing them. He testified that Koehler produced legal-sized pieces of paper, not bound or attached together, to be signed. He could not recall how many pieces were produced or how many times he signed. Koehler told the Board that they signed five sets of the agreement and five of the other document which was only a single page. He explained that he always got five sets signed and what distribution was made of them, including one for his office, one for the employer and one for the collective agreements library of the Ministry of Labour (proof of filing of which was given to the Board). Although the testimony of Brohman and Starchuk contained allusions that what Brohman signed was either not a complete collective agreement or was some other document, not a collective agreement, there is no evidence to support these allusions. The Board is convinced on the evidence before it that the documents

submitted to it and bearing Brohman's signature are the ones which he signed in November 1974 and there is no evidence whatsoever before the Board which would substantiate that these documents were misrepresented to Brohman.

6. The one which is in the form of a collective agreement between the Association and the Council would only fail to satisfy the definition of a collective agreement in section 1(1)(e) of the Act if Brohman lacked the actual or apparent authority to sign it. Brohman was unable to contact Starchuk before signing the document, but had contacted the store owner. He told the owner that it was going to be necessary for him to sign a document agreeing to wages and benefits to be paid to the carpenters. The owner told Brohman he had no objection as long as the rates were within the limits of those on which the job had been bid. He returned to the store and told Koehler that he had the authority to sign. Brohman told Starchuk no later than the following day that he had signed a document with the applicant. Koehler states that he gave Brohman a copy of each of the two documents signed, but Brohman does not recall this and Starchuk denies that he ever saw the collective agreement which Brohman is alleged to have signed until the first hearing into this grievance. There is no evidence that Starchuk ever received copies of the succeeding collective agreements between the Council and the Association. Because of the accreditation order, the Council was obligated to bargain with the Association and was under no obligation to provide the respondent with copies of any resulting agreements; that was the Association's obligation. Starchuk did not discuss the document with Brohman at any time until after this application was filed with the Board, although he stated that he became aware in December 1977 that Brohman had signed something which the applicant claimed was a collective agreement. Early in December the applicant had filed two grievances with the respondent claiming that the respondent had violated a collective agreement between the applicant and the Grand Valley Construction Association ("the G.V.C. Association"). The G.V.C. Association and the applicant are the successor organizations to the Association and the Council, respectively, named on the documents signed by Brohman. At a meeting about the grievances with Koehler and Carl Ball, another representative of the applicant, Starchuk claims that reference was made to a document which Brohman was supposed to have signed in November 1974. Since Starchuk knew that neither he nor his wife, the only persons who had signing authority for the respondent, had signed any collective agreement, he neither affirmed nor denied at that meeting that the respondent was bound to a collective agreement. Koehler and Ball deny that there was any reference at the meeting to the "Brohman" incident, although Koehler stated that he asked Starchuk for a letter agreeing that the respondent was bound to the current collective agreement and would abide in future by the hiring provisions (since one of the grievances involved an alleged infraction of those provisions). One grievance was settled and one was dropped because the job involved was at an end. The respondent claims that the one which was settled was settlement of a complaint under *The Employment Standards Act*. The applicant claims it was the settlement of a claim for unpaid wages earned under the collective agreement.

7. Notwithstanding Starchuk's protestations that the respondent was not bound at any time to a collective agreement with the applicant, beginning in January 1975 and continuing through until December 1977, the respondent employed members of the applicant on referral from it, paid the wage rates and made remittances to welfare trust funds and to the appropriate Association as directed by the applicant. Starchuk personally placed the orders with the applicant and the carpenters were supervised by him or his foreman. Prior to November 1974 the respondent had not hired members of the applicant in this manner and it

may be reasonably inferred from the evidence that the respondent was unaware of directly employing any members of the applicant at all prior to that date. On the three stores in the Farmers' Market Square project which the respondent had completed prior to November 1974, it had obtained its labour from contractors and paid the contractors, on whose payrolls the workers remained, for this service. The evidence indicates that this has been the principal source of labour on the projects managed by the respondent. While Starchuk maintains that, after November 1974, he was of the understanding that he could obtain union carpenters from the applicant whenever he needed them as long as the respondent paid the proper wage rates and other remittances, he admits no one from the applicant ever told him that and he was not aware of any other contractors who had such an arrangement. The understanding came from Brohman telling him after the November 1974 incident with Koehler that the respondent would have access to men through the applicant as long as it paid the proper wages and benefits.

8. The respondent did not make the correct remittances for the two carpenters who worked for it in November 1974. This ultimately led to Koehler visiting the respondent's office in June 1975 and providing the respondent with a work sheet explaining how to calculate them correctly. After that remittances were made without evidence of further incident. The last remittances of the respondent were made for members of the applicant employed during December 1977. From then until July 1978 the respondent was not engaged with any on-site work. In July, it was engaged to do the interiors of some stores in the Conestoga Mall in Kitchener and Starchuk asked Koehler for carpenters. There was a province-wide strike of carpenters in effect at the time and Koehler refused to supply them. Koehler states also that he told Starchuk that he would not supply the respondent with any more carpenters until the respondent gave the applicant the letter which it had requested in December 1977. Starchuk alleges that Koehler was demanding that he sign a collective agreement before Koehler would supply the respondent with carpenters. The stores in question were finished by the owners hiring carpenters and since that time the respondent has not hired carpenters through the applicant. Starchuk maintains that he decided not to use union carpenters whenever he was doing "non-union" projects. After July 1978 and until the filing of this grievance, the applicant had been unable to identify the respondent on any projects within the geographical agreement until he observed the respondent on the Industrial Plaza project in Kitchener.

9. It is clear on the evidence that Starchuk did not give Brohman the specific authority to sign a collective agreement for the respondent. On the other hand, Brohman was seen clearly to have authority greater than that of the carpenters and other labourers employed by the respondent. The owner of the store for which the two carpenters were employed by Brohman for the respondent told the Board that he was on the job constantly at the time. He referred to Brohman in terms of the job-co-ordinator and supervisor for the respondent. Mrs. Starchuk, who is an officer of the respondent, referred to Brohman as a supervisor. Starchuk had arranged originally with a contractor to supply carpenters for the store in question. When Brohman told him that he could get carpenters who were being laid off on another part of the project, Starchuk authorized Brohman to hire them. When one of them who was the applicant's job steward on the site was told by Brohman what the wage terms were the steward told Brohman that these were not acceptable and called Koehler. That call led to Koehler's visit to the job and the signing by Brohman and Koehler of the documents referred to in paragraph 4 above.

10. The Board draws the following conclusions from its assessment of the evidence and the witnesses as previously noted herein:

- (a) Brohman held himself out to Koehler as having the authority to sign a collective agreement on behalf of the respondent, both before and after Koehler queried his authority;
- (b) Koehler, who was aware that it was Brohman who had hired the two members of the applicant, did not accept Brohman's first statement that he was willing to sign an agreement with the applicant; rather, he took the precaution of querying that authority and only proceeded with the signing after Brohman, having first told Koehler that he would call the respondent's office, later told Koehler that he had authority to sign an agreement if Koehler had one there to sign;
- (c) Brohman signed a document which is in the common format of a collective agreement and, although he testified that he did so without reading it, his testimony reveals that he was quite sufficiently literate to be able to understand the nature of the document which he was signing had he taken the trouble to read it;
- (d) furthermore, while there is no evidence that Koehler represented the documents to be a simple undertaking that the respondent should pay the proper wages and benefits to the two carpenters, even if he had done so, Brohman was competent enough to recognize the misrepresentation if he had read the documents;
- (e) Brohman could not remember how many times he signed, how many copies of documents he signed, how many pages there were to the documents or being given a copy by Koehler; Koehler on the other hand clearly and unequivocally testified that five copies of each had been signed and what the distribution of the copies had been; therefore the Board, as well as being satisfied that the document filed in evidence was the one which Brohman signed, is satisfied that Brohman was given a copy of the document immediately following the signing as testified by Koehler;
- (f) the respondent's practice of getting union carpenters from the applicant whenever it had need of them is evidence of a significant change in the respondent's conduct dating from Brohman's signing of the collective agreement; the respondent continued to avail itself of this accommodation until the end of 1977 and attempted to do so again in July 1978 when it next needed union carpenters and when Starchuk clearly expected the applicant to provide them; the least that the Board can conclude from these circumstances is that the change in conduct was a response by Starchuk to what Brohman told him about signing a document with Koehler and the respondent's acts were a conscious utilization by it of the

hiring referral system in the collective agreement signed by Brohman and in the succeeding ones;

- (g) the applicant by referring members for hire by the respondent, directing and accepting remittances of union dues and contributions to the various funds established under collective agreements, taking corrective steps when these were not properly made and by filing grievances alleging violation of a collective agreement (regardless of why and how they were disposed of) was conducting itself as though it was bound together with the respondent to a collective agreement;
- (h) although Starchuk was made aware by Brohman the day after he signed the collective agreement that he had signed a document with Koehler, Starchuk made no move to identify its nature and repudiate it; Starchuk did not inform the applicant formally at any time that he was not bound by any document which Brohman may have signed on behalf of the respondent; and, whether or not the Board accepts Starchuk's testimony that he came to realize in December 1977 that Brohman may have signed a collective agreement, that testimony reveals that a conscious decision was made not to repudiate Brohman's act.

11. The critical question for the Board in this case is whether the document which Brohman signed can be found by the Board to be binding on the respondent since Brohman had no actual authority to sign it. The Board has previously found a valid and binding collective agreement to exist in such circumstances where one party held himself out as having the authority to sign and the other party reasonably believed him to have that authority. In *Inspiration Limited*, [1967] OLRB Rep. Sept. 261, the Board found a binding collective agreement to have been made when a building superintendent who had hired two carpenters signed an agreement with a union representative even though the superintendent was not authorized by the employer to sign an agreement. In its decision, the Board held the superintendent to have the apparent authority to sign the agreement because he had indicated his willingness to do so and did not indicate that the agreement would be subject to approval by a higher authority in the company. The Board found his conduct to be consistent with his actual authority to hire employees through the union to work on the job which he was supervising. The Board found the opposite situation in *Collegiate Sports Ltd.*, [1977] OLRB Rep. Aug. 487 when it determined that a handyman employed by the employer did not have the authority to sign a collective agreement on behalf of the employer. The employee did not read English with any degree of comprehension, did not understand that he was signing a collective agreement but thought he was signing documents in order to obtain union carpenters from the applicant in that case. He had not held himself out as having authority to sign a collective agreement and the union representative thought it strange that he would have such authority. Moreover, the Board found there had been no ratification by conduct of the employer since it acted to repudiate the purported agreement immediately the employer became aware of it. The Board's decision in *Sentinel Reliance Products Limited*, [1973] OLRB Rep. Jan. 7, deals with the ratification of a collective agreement by the later conduct of a party which purports not to be bound by the agreement. In that case a senior officer of an international union had been given written authorization by the international president to sign

a collective agreement with an employers' association on behalf of several locals of the international. Subsequently, one of the locals contended that it was not bound to the collective agreement because, in part, it had neither authorized the officer to sign on its behalf nor been advised by the officer that he intended to do so. The Board found that the local had insisted on its rights under the agreement and accepted its benefits by supplying a check off authorization, supplying men and accepting check off pursuant to new provisions of the agreement. The Board stated also that "It is highly significant that the applicant [i.e. the local union] never formally informed the [employers'] Association that this collective agreement did not apply to it.". The Board went on to conclude that the international officer's "... act of executing the collective agreement... on behalf of the [local union] became the act of the [local union] when subsequently ratified by the immediate conduct of the [local union] and its membership.". The Board further concluded that "... once ratification has taken place in these circumstances, the effect of such ratification is to put all parties concerned in the same position as that in which they would have been if the act ratified had been previously authorized by the [local union].".

12. While the facts in this case are different in detail from those in the *Inspiration* and *Sentinel* decisions, *supra*, they are analagous in substance. Brohman who lacked the actual authority to bind the respondent to a collective agreement, held himself out to the applicant as having the authority to do so and the applicant's acceptance of that apparent authority was reasonable in that it was consistent with the fact that Brohman had hired the two carpenters who were members of the applicant and furthermore had led the applicant to believe that he had been given the specific authority to sign an agreement by his statement that he would telephone the respondent's office and then, without advising Koehler that he had not spoken to anyone in authority for the respondent, told Koehler that he had authority to sign an agreement and proceeded to do so. Brohman's act was immediately ratified by the later acts of the respondent by retaining the two carpenters for the balance of the period for which Brohman had hired them and by Starchuk, during the next three years, obtaining carpenters from the applicant and paying their wages and making remittances to the applicant and the employers' association as a result of their employment with the respondent. On the other hand, this case is distinguishable on its facts from *Collegiate, supra*, for, while Brohman's real authority may appear similar in nature to that of Collegiate's handyman, Brohman was not lacking in comprehension of the English language and the respondent not only failed to repudiate Brohman's acts but by its conduct affirmed them.

13. The Board, therefore, adopts the reasoning in *Inspiration* and *Sentinel, supra*, and finds that the respondent, through Brohman's act of signing the collective agreement referred to in paragraph 4 herein, became bound by the collective agreement which then was in effect between the Association and the Council. Since the bargaining rights created by that act have not been declared terminated by the Board, the respondent has continued to be bound by the succeeding collective agreements between the Association and the Council and their successors. Accordingly, the Board finds that the respondent is bound to the provincial collective agreement (as is the applicant), which was in effect at the time this application was filed, between the carpenters employer bargaining agency and The Ontario Provincial Council of the United Brotherhood of Carpenters and Joiners of America.

14. Respondent counsel advances two alternative arguments which the Board has considered and rejected in reaching the above conclusions and also requested reasons in writing for one of the Board's procedural rulings, all of which the Board wishes to deal with

before leaving this matter. During respondent counsel's cross-examination of Koehler he posed a question to Koehler about statements he was alleged to have made during efforts of the parties to settle the dispute prior to the hearing. Upon objection from applicant counsel, the Board ruled that it would not allow examination into settlement attempts on the ground that such discussions are undertaken without prejudice to either party. To allow examination into such discussions would have the effect of removing the "without prejudice" protection and might undermine future attempts at consent agreements. This is a position commonly taken by arbitrators. Later in the cross-examination, while counsel was challenging Koehler's testimony on the central issue of the document which Brohman had signed, he asked the Board's leave to examine Koehler on the parties' settlement efforts. The Board withheld its consent on the same grounds and on the additional grounds that cross-examination allowed sufficient scope to test the credibility of a witness and the Board was not convinced that what the parties may have been prepared to agree to during consent bargaining would be sufficiently dispositive of the credibility issue so as to warrant, on balance, the risk of prejudicing the settlement process. The two alternative arguments raised by respondent counsel were that the applicant had abandoned its bargaining rights between December 1977 and this application by failing to diligently pursue them and that the respondent was not the employer of the two carpenters whom Brohman had hired, or of the union carpenters subsequently hired through the applicant because the respondent was only agent for its clients and not the real employer. In respect of the first argument, the evidence before the Board shows that the applicant was persistent and diligent in the pursuit of its bargaining rights within the limitations presented by the nature of the work and the employment relationships in the construction industry. In respect of the second argument, the evidence is unequivocal that, except when the respondent arranges for another contractor to supply labour to the projects which it is managing, the labour employed is hired by Starchuk, supervised by him or a foreman on his payroll and paid by the respondent on its own cheques, with all statutory deductions and remittances made by the respondent. On that evidence the respondent is clearly the party who controls their employment and, for purposes of the Act, is their employer.

15. The Board remains seized of this matter should the parties be unable to settle the grievance referred to herein.

1263-79-M Ontario Nurses' Association, Applicant, v. Royal Ottawa Hospital, Respondent.

Employee – Reference – Nursing Program Co-ordinator job created incorporating one non-bargaining unit job and two bargaining unit jobs – New job expanding supervisory duties – Whether employee.

BEFORE: N.B. Satterfield, Vice Chairman and Board Members W. Gibson and D.B. Archer.

APPEARANCES: *Larry Robbins for the applicant; Keith Billings for the respondent.*

DECISION OF THE BOARD; April 28, 1980

1. The applicant has referred to the Board for decision the question as to whether the following persons are employees of the respondent for purposes of *The Labour Relations Act*: Eunice Horvath, Helen Blenkarn, Marlene Harris, Val Watt, Diane Jon Kcheere, Judy Jessop, Anita Dewar, Barbara Simmonds and Jim Allin. Each is classified by the respondent as a nursing program coordinator ("N.P.C."). The Board authorized one of its Labour Relations Officers to meet with the parties and enquire into the duties and responsibilities of the persons whose status is in dispute. Following the release of the officer's report to the parties, the Board received written and oral submissions from the parties.

2. The respondent operates a psychiatric treatment hospital and the applicant has had bargaining rights for the regular full-time nursing staff since March 25, 1975 when it was certified by the Board. At the time the question herein was referred to the Board the parties were engaged in bargaining for a new collective agreement, following the expiry of a four-year agreement. The question referred to the Board arose during collective bargaining but was not resolved. The respondent contends that persons classified as N.P.C.'s are not employees for purposes of the Act because they exercise managerial function and/or are employed in a confidential capacity in matters relating to labour relations with the meaning of Section 1(3)(b) of the Act. The applicant holds to the contrary position. The collective agreement describes the bargaining unit in terms of all registered and graduate nurses of the respondent engaged in a nursing capacity save and except head nurses, persons above that rank and some other classifications not here relevant.

3. At the hearing with the officer, after the parties had heard the evidence of Barbara Simmonds, Val Watt and Jim Allin, they agreed that their evidence would be representative of all nine persons in dispute. The facts herein are derived from their evidence as well as that of the respondent's director of nursing, Mrs. I. Dunn. The general context within which this question arose emerges as follows from the witnesses' evidence. Some four months before this matter was referred to the Board and after the expiry of the collective agreement, the respondent restructured part of its department of nursing which contains the registered and graduate nurses and those classifications involved with their management. From the evidence before us it may be inferred that one patient-care unit, rehabilitation, was not affected by these changes, therefore the changes referred to hereafter exclude that unit. One result of this restructuring was the introduction of the N.P.C. classification. With its introduction, three other classifications were eliminated: head nurse, assistant head nurse and team leader. The head nurse classification, as noted above, is excluded from the bargaining unit, the assistant head nurse and team leader classifications are not. Another result was the establishment of the patient care coordinator ("P.C.C.") classification to whom the N.P.C.'s report. Each of three patient-care units are in charge of a P.C.C. and two other patient care units are combined within a single building under a fourth person who is classified as assistant director of nursing and patient care coordinator. For ease of reference, this position will be referred to as assistant director. Simmonds and Allin both report to the assistant director. Simmonds refers to her unit as the forensic unit and Allin refers to his as the medium secure forensic unit. Watt is N.P.C. in the general adult psychiatry unit. All of the P.C.C.'s and the assistant director report to the director of nursing (Dunn). In the predecessor organization, all of the head nurses reported to the assistant director of nursing (the same person who is now referred to above in respect of the new organization as "assistant director"). The assistant director of nursing reported to the director of nursing. The head nurses had reporting to them either assistant head nurses or team leaders.

4. The representative evidence of Simmonds, Watt and Allin in respect of the duties and responsibilities of the nine persons in the N.P.C. classifications concurred on all matters of a substantive nature, except on a few details and differed on some minor matters. These differences are readily characterized as ones resulting from differences in personal approaches to the job or the nature of the particular treatment unit in which each of the witnesses worked and in no way alter the near unanimity of their evidence. Simmonds and Watt had been head nurses before being appointed as N.P.C.'s coincident with the introduction of that classification, Simmonds for three years and Watt for five and one-half years. Allin was previously a staff nurse and was promoted to the new classification three months after its introduction. At the time of the officer's enquiry into the position, Simmonds and Watt had five months experience in it and Allin nearly one month. As a result of the relatively short duration of Simmonds' and Watt's experience in the new position, combined with the fact that the evidence shows that the N.P.C. classification was very largely structured around the former head nurse classification, it was difficult at times to determine whether they were referring to their duties and responsibilities as head nurses or N.P.C.'s. In these instances, unless there was clear evidence that duties which they had as head nurses were not incorporated into the N.P.C. classification, the Board has concluded that the duties applied to the new classification as well as the former one.

5. The evidence of Simmonds, Watt and Allin reveals the following facts in respect of the duties and responsibilities of persons in the N.P.C. classification:

- (a) they do not carry an assigned patient case load and when they are directly involved with a patient it is usually because of the temporary unavailability of a staff nurse, to personally check on the patient's treatment, or to instruct the attending nurse;
- (b) with the exception of Allin who was involved with a new treatment unit which was predominantly staffed by persons new to that particular milieu, the N.P.C.'s would spend only about 10% of their time dealing directly with patients;
- (c) they are responsible for nursing coverage in their units on all three shifts seven days a week, directly on the day shift Mondays through Fridays on which they work and by their delegation to a staff nurse on the two off shifts and weekends;
- (d) they are responsible for 16 to 22 other employees, full-time and part-time staff nurses, nursing assistants and orderlies and the ward clerks, whose working conditions are governed by either of two collective agreements with the applicant or a collective agreement with the Canadian Union of Public Employees;
- (e) while the evidence is somewhat equivocal about their role in the grievance procedure, the Board is satisfied on the balance of probabilities that they act for management at the first step: Simmonds and Watt have dealt with grievances in the past; the two agreements with the applicant specify that the first step in the procedure is for the grievance to be submitted in writing to and be discussed

with the head nurse and requires the head nurse to reply in writing; the job description for the head nurse does not refer to any responsibilities under the collective agreement while the one for the N.P.C. classification refers to their responsibility to manage within the collective agreements.

- (f) they prepare, following a master schedule, and post at regular intervals the shift schedules for their staff and have varied from the master schedule or their posted schedules on their own authority, they assign patient load to staff and their daily duties, supervise them in their work and correct unsatisfactory work performance;
- (g) they evaluate the performance of all of their staff using a standard evaluation form; this is done first at the end of a probationary period, at which time they recommend whether the employee should be retained (where they recommend against retention, the recommendation is usually followed) and annually thereafter; the evidence indicates that the annual evaluation is a report on the quality of performance and there is no evidence to indicate that it forms a basis for the N.P.C. to recommend any course of action which might flow from the evaluation;
- (h) they have exercised their authority to send staff home whom they have considered not fit to take their shift and have recommended to their supervisors the disciplinary action to be taken; they have no authority for discharge, that is vested in Dunn's position, but all say they have the authority to recommend dismissal and Watt has exercised it in the past;
- (i) They have exercised their authority to grant short periods of leave without pay when this can be done without requiring replacement staff and approve short term leaves within hospital policy for purposes such as attending conferences; they schedule staff vacations pursuant to vacation entitlements under the collective agreements;
- (j) they decide whether position vacancies in their units are to be filled, submit the requisition to the personnel department, post the job positions prepared by personnel and interview internal and external candidates jointly with the patient care coordinator; the N.P.C.'s select the successful candidate, notify the personnel department and sign the letter of offer to the successful candidate or advise that person orally that they have been selected; and
- (k) they attend regular monthly meetings of senior nursing staff (of whom none of the other persons attending are in any of the bargaining units at the hospital) at which matters of hospital policy are discussed, including such matters as the changes negotiated in the collective agreement as they affect the staff supervised by the

persons at the meeting and the plans for the organizational changes out of which the instant question arose.

6. Simmonds and Watt both testified that their duties and responsibilities had been increased, specifically in relation to the granting of short term leaves of absence and the hiring activity, although they both referred to some reduction as well. The only specific evidence of possible reduction in responsibility was with reference to interviewing candidates for job vacancies which they formerly did alone and now were doing jointly with their P.C.C.'s. Their evidence is conclusive, however, that the ultimate selection is their responsibility. While this is evident from the testimony of all three N.P.C.'s, it is particularly so from that of Allin who has been involved in hiring some 20 of the staff for his unit.

7. While it is unclear from the evidence whether the N.P.C.'s are under individual employment contracts, it is clear from Allin's evidence that the terms and conditions of employment are different from those of the employees covered by the collective agreements.

8. The answer to the question which has been referred to the Board is dependent on whether the nine persons in the N.P.C. classification are excluded by Section 1(3)(b) of the Act which states:

"(3) Subject to section 80, for the purposes of this Act, no person shall be deemed to be an employee,

(b) who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations."

The purpose of excluding persons who may fall into either of the expressed exclusions is to avoid situations where their job functions potentially or actually conflict with their loyalties to one or the other of the parties to the collective bargaining process. The importance to the collective bargaining process of avoiding such situations is well expressed by the Board in *Chrysler Canada Limited*, [1976] OLRB Rep. Aug. 396:

"12. The identification of management is fundamental to the scheme of collective bargaining as set out in the Labour Relations Act. What is contemplated is an arm's length relationship between the employees represented by a bargaining agent, on the one side, and the employer acting through management on the other side. The Act attempts to create a balance of power between these two sides by insulating one from the other. Employees, therefore, are protected from management interference and domination by the prohibitions against employer interference with trade union and employee rights. Management, by the same token, is protected by excluding from collective bargaining either persons exercising managerial functions, or persons employed in a confidential capacity in matters relating to labour relations. Collective bargaining rights, therefore, are not universal, but must be qualified by the need to preserve a countervailing force on the employer side."

The Board has developed two tests which aid it in excluding from the bargaining unit persons who exercise managerial function: the effective recommendation test which excludes

persons who exercise a power of effective recommendation over the terms and conditions of employment of the employer's employees; and the independent decision-making authority test which excludes persons who exercise such authority in respect of policies of the employer or the overall operation of the employer's business. For a fuller statement of the application of these tests, see the Board's decision in *Inglis Limited*, [1976] OLRB Rep. June 270.

9. Having regard to all of the evidence in the officer's report and to the facts herein, the Board finds that the N.P.C.'s assign, direct and supervise the work of the staff nurses, nursing assistants, orderlies and ward clerks in their respective treatment units. They spend an inconsequential portion of their time performing the same work as the persons whom they supervise. Their role in the hiring process and the evaluation of employees at the end of a probationary period of employment, together with their authority to send employees home and to recommend discipline, including dismissal, places them in a position of being able to affect the terms and conditions of employment of the employees they supervise. Their scheduling of work, albeit within a master schedule and the exercise of their authority to vary the schedule, the granting of short-term leaves of absence, the scheduling of vacations and the correction of work performance when exercised in concert with the exercise of their effective recommendation authority assumes more the character of a managerial role than a simple co-ordinating one. Finally, the N.P.C.'s are regular participants in the meetings of senior nursing staff, meetings which are not attended by bargaining unit staff and at which are discussed matters of hospital policy and which is also the forum for discussing how changed provisions in the collective agreements will affect the management of the employees whom the N.P.C.'s supervise.

10. The degree of direction and control which they exercise over staff involved with the nursing program in their treatment units and the cumulative weight of their duties and responsibilities identifies the N.P.C.'s clearly with the respondent's management team. That, plus the finding that they act for management at the first step of the grievance procedures leads the Board to the conclusion that they exercise managerial function within the meaning of Section 1(3)(b) of the Act.

11. Each of the parties in its submission to the Board devoted part of its argument to the impact of the organizational change on the locus of the first line of managerial authority. The applicant contended that some of the head nurses' responsibility and authority had been given to the P.C.C.'s to the extent that the remaining responsibility (and the attendant authority) incorporated into the N.P.C. classification were so diluted that the N.P.C.'s were not the first line of supervision. The respondent contended that the responsibility and authority of the N.P.C.'s was enlarged over that of the head nurses so as to increase the managerial content. While it was useful to the Board to consider the evidence in respect of change because of the brief period of time that the new classification had been in existence, the question of the effect of the change is not the one which the Board is required to answer. Rather it is required to answer the question of whether the nine persons at issue were employees for purposes of the Act on the basis of the evidence before the Board.

12. Having regard to all of the foregoing, the Board finds that Eunice Horvath, Helen Blenkarn, Marlene Harris, Val Watt, Diane Jon Kcheere, Judy Jessop, Anita Dewar, Barbara Simmonds and Jim Allin are not employees of the respondent for purposes of *The Labour Relations Act*.

1578-79-U; 1615-79-R United Food and Commercial Workers International Union, Applicant, v. **Sunnylea Foods Limited**, Respondent, v. Group of Employees, Objectors.

Agriculture – Certification – Discharge for Union activity – Whether employees of egg-grading station employed in agriculture – Union supporters laid-off – Employer threatening to close business if union successful

BEFORE: Ian C.A. Springate, Vice-Chairman and Board Members C.G. Bourne and H. Simon.

APPEARANCES: *James Hayes. Pamela Sigurdson, Shalom Schacter and Don Dayman for the applicant/complainant; H. Tursktra, D. Ivey and J. Zonneveld for the respondent; Lorna Latka, Rick Zwaagstra, Gerard Blokker, Hennie Vandervelde and Ed Werner for the objectors.*

DECISION OF THE BOARD; April 30, 1980

1. File No. 1578-79-U is a complaint under section 79 of *The Labour Relations Act* which alleges that six individual grievors were dealt with by the respondent contrary to the provisions of sections 56, 58(a) and 61 of the Act. File No. 1615-79-R is an application for certification in which the applicant trade union is seeking to be certified as the bargaining agent for a unit of the respondent's employees.
2. Counsel for the respondent challenged the Board's jurisdiction to deal with the respondent's employees on the basis of the claim that they are excluded from the scope of the Act by section 2(b). Section 2(b) provides that the Act does not apply "to a person employed in agriculture". At the hearing the Board ruled orally that the respondent's employees do not come within the scope of this exclusion. Our reasons for this determination are set out below.
3. The respondent operates an egg grading station at Grimsby, Ontario. Truck drivers in the employ of the respondent transport eggs from various farms to the egg grading station. At the station other employees wash, candle, grade and pack the eggs. The respondent's truck drivers then transport the eggs to the respondent's customers, most of which are supermarket chains.
4. The president and controlling shareholder of the respondent is Mr. Jacob "Jack" Zonneveld. Jack Zonneveld is also the president and controlling shareholder of two other corporations, namely, Sunnysbrea Farms Ltd. and Sunny Eggs Ltd. Sunnysbrea Farms Ltd. operates a 148 acre farm some twelve miles away from the grading station. The farm has three laying barns and a total of some 76,000 hens. All of the eggs produced on the farm are sold to the respondent. Corn and wheat are also grown on the farm. The corn is used for chicken feed, while the wheat is sold as a cash crop. Sunny Eggs Ltd. is an egg contracting company. It contracts with independent farmers to produce eggs for the company. It would appear that all of the eggs produced under this arrangement are sold to the respondent.
5. Approximately twenty-five per cent of all eggs graded by the respondent are purchased from Sunnysbrea Farms Ltd. and Sunny Eggs Ltd. The remaining seventy-five per cent are purchased from independent egg producers.

6. The cutting of grass and removal of snow from the respondent's premises is performed by employees of Sunnybrea Farms Ltd. with Sunnybrea billing the respondent for the cost of these services. The respondent's maintenance supervisor, Mr. Joe Pollo, who exercises managerial functions, does some maintenance work for Sunnybrea Farms. The only employee within the proposed bargaining unit who from time to time works at the Sunnybrea farm is Mr. Gerard Blokker, a truck driver. On occasion Mr. Blokker hauls grain from Sunnybrea Farms' fields and also transfers pullets to Sunnybrea's hen house. It appears that the respondent bills Sunnybrea Farms for the time that Mr. Blokker is so engaged.

7. We understand the term "agriculture" to encompass all of the various branches of farming, including the keeping of chickens for egg producing purposes. Accordingly, we do not doubt but that persons engaged in this task on the Sunnybrea farm are persons employed in agriculture and thus outside the scope of the Act. It is also our view that in determining the scope of the section 2(b) agricultural exception one should not seek to artificially divide an integrated operation into separate agricultural and non-agricultural components. Accordingly, if employees are engaged in tasks which form an integral part of a farming operation, we are of the view that they should be viewed as persons employed in agriculture even in those cases where if the same tasks were being performed under other conditions, the persons performing those tasks would not be regarded as being employed in agriculture.

8. By way of example, employees on a farm may be involved not only in the cultivation and harvesting of a particular crop, but also in its cleaning and packing. Although the cleaning and packing operations may not fall within most definitions of the term agriculture, nevertheless, if it is done as an integral part of the farming operation, we believe it would be unreasonable to conclude that when the farm employees are engaged in cleaning and packing the crop they are not employed in agriculture. However, we take the view that when a company prepares farm products for market, not as an integrated part of a farming operation, but as a separate commercial operation, then the employees involved are not persons employed in agriculture.

9. The Board dealt with a situation analogous to the one now before us in the *Federal Farms* case, 63 CLLC ¶16,293. In that case a company which operated a vegetable farm, as well as a plant a short distance away where its produce, and the produce of other farms was trimmed, washed, graded and packed, contended that its plant employees were employed in agriculture. In support of this position, the company argued that the operations at the plant did not differ in any way from the business carried on by a farmer who sells his own produce. In the company's view, the nature of the work did not change simply because some of it was performed away from the farm. The Board in that case rejected the company's argument and concluded that insofar as its plant operations were concerned, the company was not engaged in agriculture but in a commercial enterprise of preparing vegetable produce for market. In coming to this conclusion, the Board made the following comments:

"We cannot accept the respondent's argument that the only difference between its operation and that of a farmer who sells his own produce is the scale of the operation. Most commonly, employees of such a farmer both work in the fields and prepare the produce for market. Also in the case of the farmer, the preparation of his produce for market is incidental to the growing and harvesting of his crops. Moreover, the farmer does not have a separate plant and work force exclusively

devoted for five months of the year to the preparation and distribution of its produce to market. Of greater significance, however, is the fact that the farmer only handles the produce of his own farm, whereas in the case of the respondent only a fifth of the produce which it prepares for market is grown on its farm. Clearly the preparation of produce for market in its plant is not incidental to its operations. We accordingly find no analogy between the farmer who sells his own produce and the operations of the respondent.

We do not accept the respondent's argument that its operations is a single, indivisible enterprise of growing farm produce and preparing it for market. In our opinion the growing and harvesting of the vegetable produce on the farm and the preparation of the produce for market in the plant are readily divisible. If the plant operation was separately owned, we would have no difficulty in finding that the owner of the plant was engaged in a commercial enterprise of preparing and distributing vegetable produce to market and that this enterprise was quite separate and apart from the farming operation. (*Ontario Tree Fruits Co-operative Limited* case, 62 CLLC ¶16,235). Common ownership of the farm and plant operations, in our opinion, does not make the two operations any less divisible. The fact that 80 per cent of the produce prepared for market in the plant comes from sources other than the respondent's farm serves to emphasize the divisibility of the respondent's operations.

With respect to its plant operations the Board finds that the respondent is not engaged in agriculture or horticulture but rather that the respondent is engaged in a commercial enterprise of preparing vegetable produce for market. In the instant case, the intermingling of produce from the respondent's farm with produce from other sources, and the fact that the produce remains in its 'natural state' does not alter the above finding by the Board. We would add that with regard to its farm operations the respondent clearly is engaged in agriculture."

10. We are of the view that the same reasoning applies in the instant case. If the employees of Sunnybrea Farms Ltd. themselves washed, candled, packed and then transported the eggs produced on the farm to supermarkets and other customers, a strong argument could be made that these steps were an integral part of the farm's operation, and that when the farm's employees were so engaged they were still persons employed in agriculture. In actual fact, however, and washing, candling and packing of eggs is not done on the premises of Sunnybrea Farms Ltd. Rather, the owner of Sunnybrea Farms has seen fit to establish a separate business operated by a different corporate entity, namely, Sunnylea Foods Ltd., to perform this work at a facility some distance away. Approximately seventy-five per cent of the eggs which pass through Sunnylea's facility come from farms other than Sunnybrea. From Sunnylea's facility the eggs are distributed to supermarkets by Sunnylea's employees. We are satisfied that the operation conducted by the respondent, Sunnylea Foods Ltd., is not an integral part of any farming operation, but instead is a separate commercial operation involved in the preparation for and delivery of eggs to market.

11. Counsel for the respondent referred us to the decision of the Divisional Court in *Scott v. McCandless Poultry Farms*, 76 CLLC ¶14,051. In the *McCandless* case, the court upheld the decision of a referee under *The Employment Standards Act* that employees in the company's egg grading facility were exempt from the minimum wage provisions of the Act because:

- 1) work involving the grading of eggs is included in the primary production of eggs and
- 2) it is not appropriate to exempt an employer from an exemption when part of what an employee's work consists of comes within the exemption.

12. We are of the view that the reasoning of the Divisional Court is not applicable to the case before us. In the *McCandless* case, the Court was concerned with a regulation under *The Employment Standards Act* which provides that certain parts of that Act do not apply to "a person employed on a farm . . . whose employment is directly related to the primary production of eggs". Thus, the issue before the court was whether the employment of certain individuals was directly related to the primary production of eggs, not whether they are persons employed in agriculture. In addition to this, the facts of the *McCandless* case appear to differ sharply from those in the instant case. *McCandless* apparently did its egg grading right on its farm, with most of its employees dividing their working time between the egg grading station, the barns and the fields. It appears that the egg grading was in fact an integral part of *McCandless*' farming operations, and not, as here, a completely separate operation.

13. As already indicated, one employee of the respondent, Mr. Blokker, does on occasion perform truck driving work associated with the farming activities of Sunnybrea Farms. When engaged in these activities, Mr. Blokker would appear to be both outside of the geographic scope agreed to by the parties for the bargaining unit, as well as outside the scope of *The Labour Relations Act*.

14. On November 13, 1979 the respondent either dismissed or laid off the following six grievors, namely: Debbie Hensen, Candace Norris, Nelly Van Herk, Cynthia "Cindy" Sheridan, Paul Wright and Robert Berton. The union alleges that the respondent's actions in this regard were motivated by anti-union considerations contrary to the provisions of sections 56, 58(a) and 61 of the Act. This allegation is denied by the respondent.

15. Certain of the evidence led at the hearing touched upon the religious beliefs of Mr. Jack Zonneveld. There is no question but that Mr. Zonneveld, who is a deacon of the Christian Reform Church in Grimsby, is a deeply religious man. According to Mr. Zonneveld, unions are not consistent with his religious beliefs. In this regard Mr. Zonneveld stated that a person who is a member of a union cannot be a deacon in his Church, and in his view, if a union were to come to represent his employees he himself would no longer be able to hold any position of authority in the Church. Mr. Zonneveld testified that he indicated to two of the respondent's employees, namely Mr. Gerard Blokker and Miss Hennie VanderVelde, that due to his religious beliefs he would have to close down the egg grading plant if the union were certified. Mr. Jack Zonneveld also stated at the hearing that his brother Leen, who manages the respondent's day-to-day production activities, would have been

aware of his views in this regard, even though Leen does not have the same religious beliefs as he. Mr. Jack Zonneveld further testified that he felt that a number of "key" employees would for religious and other reasons not want to continue working for the respondent if the union got in. Mr. Zonneveld indicated that he felt it would be impossible for him to try to operate the respondent without the services of these key employees.

16. On or about November 3, 1979, the grievor, Robert Berton, who was employed as a truck driver, began to question employees concerning their interest in being represented by a trade union. On November 9th, Mr. Berton made the initial employee contact with the trade union. On or about November 9th, Mr. Berton asked another truck driver, Harvey Crowe, to speak to the grievor, Cindy Sheridan, an egg grader, to find out how many of the female employees would be interested in joining a union. Miss Sheridan approached a number of employees in this regard. Miss Sheridan was also given the names of a number of employees interested in joining the union by the grievor, Debbie Hensen. On Monday, November 12, 1979, Miss Sheridan handed Mr. Crowe a list with some ten to fifteen names of employees who are interested in joining the union and Mr. Crowe passed his list on to Mr. Berton. The names of all six of the grievors, except Mr. Berton, were included on the list. The evidence indicates that on November 12th employees were fairly open in their discussions about the union.

17. On November 13, 1979, Mr. Leen Zooneveld called together Debbie Hensen, Candace Norris, Nelly Van Herk and Cindy Sheridan, all of whom are close friends of each other, and advised them that the respondent was overstaffed and that he had chosen the four as the ones to be let go. When asked why three employees more junior than they were not the ones being let go, Leen Zonneveld offered no response. A copy of the "Record of Employment" completed by the respondent for Employment and Immigration Canada with respect to Miss Sheridan was filed at the hearing. The form gives no reason for her termination, and is marked to indicate that Miss Sheridan would not be returning to work for the respondent.

18. On November 13th, Leen Zonneveld advised the grievor, Paul Wright, who is a truck driver, that he was being terminated due to a shortage of work and a cutback in employees. Mr. Wright asked why he had been selected to be laid off when he had more seniority than another driver John Vanderveen. In response to this question, Leen Zonneveld replied that Mr. Wright had been chosen because he had raised a number of objections about wages, and because Mr. Zooneveld felt that he was not happy with his job and was probably looking for other work. Mr. Wright testified that he had not been looking for other work. A copy of the "Record of Employment" for Mr. Wright was also filed at the hearing. This document lists no reason for Mr. Wright's termination and indicates that he will not be returning to work for the respondent. On November 13th, Leen Zooneveld told Mr. Berton that he was being terminated because his truck had been down twelve quarts of oil on November 5th, and because he was not keeping proper maintenance on his truck. It appears that all five of the grievors were terminated shortly prior to them or anyone else actually signing a union card. Five of the grievors applied to become members of the union on November 13th and the sixth joined on November 14th.

19. On Thursday, November 15, 1979, Leen Zonneveld called Miss Sheridan and Mr. Wright and asked them to return to work, which they did. About this time both Miss Norris and Miss Van Herk were also recalled, although the latter declined to return. Mr. Wright

went into work on Saturday, November 17th to check out his truck for the following Monday. While so engaged, Mr. Wright was asked by Leen Zonneveld how the union was going. Mr. Zonneveld also commented to him that if the union got in Jack Zonneveld might close the business because of his religious beliefs.

20. Mr. Zonneveld testified as to why the six grievors were let go on November 13th. According to Mr. Zonneveld, he learnt about the union on November 12th, news which he admitted "knocked me for a loop". Mr. Zooneveld testified that he felt that the last thing he needed was a union on his back. He also stated that he was concerned that once the union got in he was going to be stuck with a number of employees he did not need. Accordingly, he stated, on the afternoon of November 12th he met with his brother Leen and Mr. J. Pollo, the maintenance supervisor, and told them that he wanted a list of people they could do without as well as the reasons why they could do without them. According to Jack Zonneveld, he was then provided with the names of the six grievors. It might be noted at this point that neither Leen Zonneveld nor Mr. Pollo were called to testify before the Board.

21. With respect to the four female grievors, Mr. Jack Zonneveld indicated that he decided that they be let go strictly on the basis of their ability. The respondent led no evidence at all concerning the work performance of Miss Norris, Miss Sheridan or Miss Van Herk. With respect to Miss Hensen, Mr. Jack Zonneveld testified that he had been told by both his brother Leen and Mr. Pollo that she would not follow directions. No direct evidence, however, was led on this point. With respect to Mr. Wright, Mr. Zonneveld indicated that he was let go because the services of a driver could be dispensed with. Mr. Zonneveld further testified that he decided to let Mr. Wright go rather than Mr. Vanderveen, who was junior to Mr. Wright, because Mr. Vanderveen was the better man.

22. Mr. Zonneveld testified that Mr. Berton had been chosen as one of those to be let go because he had for the second time let the oil in his truck run low. Direct evidence was led before the Board only with respect to one such incident, and Mr. Berton categorically denied that he had been spoken to about another such incident. The incident about which evidence was led occurred on Monday, November 5, 1979. Mr. Berton was off work that day, and his run was performed by a maintenance man, Mr. Joe Bokowski. Mr. Bokowski testified that on the day in question he checked the oil level in Mr. Berton's truck and found no oil showing on the dip stick. According to Mr. Bokowski, he first got Mr. Leen Zonneveld to examine the situation and then added twelve quarts of oil to the truck. Mr. Berton indicated that on the average his truck burns up three quarts of oil for every ten hours of running time. It is possible that a driver other than Mr. Berton had driven the truck on Saturday, November 3rd, but by itself that should not have accounted for a loss of twelve quarts. For his part, Mr. Berton stated that he had first been advised of the matter on November 12th, when Leen told him that his truck had been down on oil and to keep his eye on it. Mr. Berton indicated that he had been surprised by this allegation because he checked the oil level every day, and that when he checked the truck on Friday, November 2nd, it had been down only half a quart.

23. Mr. Berton had been employed by the respondent as a truck driver since June of 1975. Mr. Berton testified that there had never been any previous complaints regarding his driving or truck maintenance. Mr. Berton also testified that he had received a bonus for going through the first half of the year without an accident or damage to his truck and without a ticket.

24. As indicated above, four of the grievors were recalled to work shortly after they had been let go. With respect to Mr. Wright, Mr. Jack Zonneveld testified that when the decision was made to let him go he had not realized that Mr. Pollo was entitled to, and had already made arrangements for, a week's holiday. Mr. Zonneveld stated that because of this factor he asked his brother Leen to recall Mr. Wright. Mr. Wright continued to work for the respondent after the time that Mr. Pollo was scheduled to return from his holiday. Mr. Jack Zonneveld further testified that sometime between November 14th and 16th an employee resigned, and accordingly Miss Van Herk was offered re-employment, which she refused. Miss Sheridan was then offered re-employment and she did return. According to Mr. Zonneveld, when another employee indicated that she wanted some time off for medical reasons, Miss Norris was called back to replace her. Mr. Zonneveld indicated that he would not be recalling Mr. Berton because he did not look after his truck, or Miss Hensen because she would not take directions.

25. The evidence establishes that the volume of work performed by the respondent's employees fluctuates substantially. Generally, the respondent is busiest in the periods prior to Christmas and Easter. In this regard it might be noted that the grievors were let go during the month of November. The respondent's business also fluctuates on a weekly basis dependent upon the timing of promotions on eggs run by the supermarkets. These fluctuations, however, appear to be an ongoing factor, and no evidence was led to establish that prior to November 13, 1979 the respondent had reacted to such fluctuations by the laying off of staff. Indeed, Mr. Zonneveld indicated that prior to November there had not been any staff layoffs in 1979. Mr. Zonneveld also testified that the respondent experiences a high degree of staff turnover, and that for every five to seven employees hired, only one might stay on.

26. The next event of any importance after the letting go of the six grievors occurred on the afternoon of November 19, 1979 when Miss Hennie Vandervelde began to quiz employees as to whether or not they supported the union. At one point Miss Vandervelde indicated to some of the employees that if the union came in, Jack Zonneveld would close the plant because of his religious beliefs. As noted above, Mr. Zonneveld testified that he had indicated to Miss Vandervelde that this would in fact be his course of action. The status of Miss Vandervelde was put in issue at the hearing, with the union claiming that she is a person who exercises managerial functions. Based on the evidence before us we are satisfied that Miss Vandervelde does not exercise managerial functions, although she checks products for quality control purposes and also fulfills a number of functions which one would generally associate with a "lead hand".

27. On the afternoon of November 19th, Miss Vandervelde informed the employees that there would be a meeting at the home of another employee, Lorna Latka, at 4:30, that is one-half hour prior to the regular quitting time. At 4:30 approximately ten employees stopped work and went to Miss Latka's house. These employees did not lose any pay as a result of their leaving work early. One of the ten employees who left early, Miss Sandra Rattle, went to punch out at 4:30 but upon doing so found a notice over the time clock saying do not punch out. At the meeting at Miss Latka's house, Miss Vandervelde passed around a document which stated that those signing it wished to cancel their membership in the union. None of the employees present signed the document. During the course of the meeting, Miss Vandervelde, in response to a comment by one of the employees present, indicated that she would arrange for a meeting to be held between the employees and Jack Zonneveld.

28. The following morning, November 20, 1979, Miss Vandervelde advised the employees to stop working and come to a meeting with Jack Zonneveld. All employees except for the truck drivers attended the meeting. At the meeting Mr. Zonneveld stated that he had heard talk of a union, that he was against a union because of his religion, but that there was nothing he could do to stop it. Mr. Zonneveld also went into some detail concerning the operating problems the respondent was facing, particularly with respect to costs and competition.

29. On the afternoon of Tuesday, November 20th, Miss Vandervelde again advised employees to stop work and meet with Jack Zonneveld, this time in small groups. At these meetings, Mr. Zonneveld asked the employees about possible improvements in working conditions. At about 5:00 p.m. on the same day, the employees each received a leaflet from the respondent. The leaflet indicated that Mr. Zonneveld did not feel that the employees required trade union representation. The leaflet also informed the employees that they would be receiving a wage increase as well as improvements in working conditions and fringe benefits. On Thursday, November 22nd, Mr. Jack Zonneveld again met with the employees in groups to discuss these improvements.

30. The union applied to be certified on November 20, 1979. A few days later, when a notice from the Board was posted to inform employees of the application, Leen Zonneveld told Mr. Crowe that if the employees wanted a union everyone would be out of a job by the end of December since his brother Jack would not let the union stand in the way of his religion.

31. On or about Friday, November 23, 1979, a number of documents were circulated by employees on the respondent's premises during working hours. One set of documents was meant to be signed by those employees who had not signed a union card, while the other set was intended for those who had signed a union card, but now no longer supported the union. Seven employees who had signed a union card signed such a document. These documents were all filed as employee statements of desire in opposition to the application for certification.

32. We turn now to consider the merits of the section 79 complaint.

33. Having regard to the provisions of section 79(4a) of the Act, for the respondent to succeed with respect to the section 79 complaint it must satisfy the Board that its actions were in no way motivated by anti-union considerations, and that union activity played neither a major nor a minor role in regard to its actions concerning the grievors. See: *Fielding Lumber Company Limited*, [1975] OLRB Rep. Sept. 665 and *R. v. Bushnell Communications* (1974), 47 D.L.R. (3d) 688 (Ont. C.A.).

34. If Mr. Zonneveld's testimony is to be believed, his decision to dispense with the services of the grievors was motivated only by a concern that if the union came in he would be stuck with a number of employees he did not need. It might be noted that in a fairly recent case the British Columbia Labour Relations Board ruled that an employer's action in dismissing an employee on the basis of this type of reasoning was unlawful. See: *Bossom Glass Co. Ltd.*, [1979] 3 Can LRBR 289. On the facts before us, however, there is no need to make a determination with respect to the legality of a termination based on this type of reasoning in the Province of Ontario. Based on all of the evidence before us we are not pre-

pared to accept the accuracy of Mr. Zonneveld's testimony insofar as it relates to the reasons why he terminated or laid off the six grievors.

35. The inherent flaw in Mr. Zonneveld's contention that he decided to let the grievors go because he did not want to be stuck with people he did not need once the union go in, is that the respondent did in fact require the services of at least some of the grievors. Within a few days of being let go, four of the grievors were offered reinstatement in their jobs. Mr. Zonneveld stated that Mr. Wright was recalled because Mr. Pollo had arranged to go on a week's vacation. However, Mr. Zonneveld also testified that it was Leen Zonneveld and Mr. Pollo who advised him of what employees the respondent could do without. Surely Mr. Pollo would have been aware of his own vacation plans. In addition to this, Mr. Wright continued to be employed even after Mr. Pollo returned from his vacation. With respect to Miss Van Herk, Miss Sheridan and Miss Norris, it is true that each was recalled in response to some other employee leaving. However, Mr. Zonneveld's own testimony was to the effect that the respondent experienced a high degree of staff turnover. Accordingly, it must have been clear to Mr. Zonneveld at the time he let these employees go, that he shortly would be experiencing a labour shortage. On top of this is the fact that the respondent terminated these employees in November, notwithstanding the fact that the time prior to Christmas is one of the respondent's busiest periods. Based on these considerations, we are led inescapably to the conclusion that, notwithstanding Mr. Zonneveld's claim to the contrary, the grievors, Wright, Van Herk, Sheridan and Norris were not let go because their services were no longer needed and the respondent was concerned about being stuck with them after the union got in.

36. With respect to the other two grievors, namely Mr. Berton and Miss Hensen, while the respondent might have had complaints with respect to their work performance, no disciplinary action had been taken against them prior to Mr. Jack Zonneveld learning about the trade union. In this regard, even if we accept the respondent's contention that it discovered on November 5th that Mr. Berton had let the level of oil in his truck run down, that is something which Leen Zonneveld knew about on November 5th, but imposed no discipline on Mr. Berton because of it. Further, in assessing the weight to be given to Mr. Zonneveld's explanation as to why he decided to terminate these two grievors when he did, we feel we cannot overlook that fact that Mr. Zonneveld sought to mislead the Board concerning why he decided to let the other four grievors go.

37. When Mr. Zonneveld became aware of the fact that some of his employees desired trade union representation, the applicant's organizing campaign was still in its infancy. However, by that time, all six of the grievors had declared themselves to be interested in being represented by a trade union. The grievors, Mr. Berton, Miss Sheridan and Miss Hensen, were active in approaching employees to assess their interest in joining a union. The two other female grievors were close friends of Miss Sheridan and Miss Hensen. On November 12th, employees had discussed the trade union openly at work. On these facts it appears to us that one explanation for Mr. Zonneveld's conduct is that when he learnt about the union he somehow became aware, or surmised, that the six grievors were union supporters. (In this regard it might be noted that Mr. Zonneveld acknowledged in cross-examination that he came to know which employees were for and which were against the union.) Having concluded that the six grievors were union supporters, Mr. Zonneveld, motivated by his strong opposition to trade unions, may have determined to let the grievors go. However, when faced with a real need for the services of some of the grievors, as well as lacking any

basis to justify their termination, Mr. Zonneveld may have felt it necessary to recall four of the grievors, while not recalling the two he felt he could make a case against. We feel this explanation for Zonneveld's conduct to be a highly reasonable one, particularly in light of our conclusion that the explanation advanced by Mr. Zonneveld to explain his actions was untrue. Taking these considerations into account, and on the basis of all of the evidence before us, we are of the view that the respondent has failed to satisfy the onus placed on it by section 79(4a) of the Act. Accordingly, we find that the respondent did discriminate against each of the grievors contrary to the provisions of section 58(a) of the Act.

38. In a brief decision dated March 13, 1980, the Board directed that the respondent reinstate Mr. Berton and Miss Henson with compensation. The other four grievors had all earlier been given an opportunity to return to work for the respondent. The Board now directs that these four grievors, namely, Miss Van Herk, Miss Norris, Miss Sheridan and Mr. Wright be compensated for loss of earnings and other employment benefits. This compensation is to include interest on lost wages calculated in accordance with the principles set forth in the *Hallowell House Limited* case, File No. 0905-79-R, decision dated January 21, 1980, as yet unreported. The Board will remain seized of this matter in the event the parties are unable to agree on the quantum of compensation.

39. The Board now turns to consider the application for certification.

40. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

41. Having regard to the agreement of the parties, the Board finds that all employees of the respondent in the City of Grimsby, save and except forepersons and persons above the rank of foreperson, office staff, sales staff, student employed during holiday and vacation periods and persons regularly employed for not more than 24 hours per week, constitute a unit of employees of the respondent appropriate for collective bargaining.

42. At the hearing the parties were unable to completely finalize an agreed upon list of employees in the bargaining unit on date of the making of the application. However, on the material before it, including the determination with respect to the section 79 complaint, and our conclusion with respect to the status of Miss Vandervelde, the Board is satisfied that there were either 40, 41 or 42 employees in the bargaining unit on the application date, and that 21 of these employees were members of the applicant on November 28, 1979, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Accordingly, the applicant has filed evidence on behalf of at least fifty per cent of the employees of the respondent in the bargaining unit.

43. Having regard to the provisions of section 7(2) of the Act the applicant's membership position would normally entitle it only to have its support tested in a representation vote. The applicant, however, is requesting that it be certified pursuant to the provisions of section 7a. This section provides as follows:

“Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a member

of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit."

44. The Board has already determined that the respondent violated the Act by its treatment of the six grievors. The Board is also of the view that both Leen and Jack Zonneveld violated the Act in indicating to employees that if a union got in the respondent would close its doors. In our view, these comments amounted to employer interference with the selection of a trade union contrary to section 56 of the Act as well as a threat to compel employees to refrain from becoming or to cease to be members of the applicant union contrary to section 58(c). It might be that the applicant's certification will cause Mr. Jack Zonneveld to sell or otherwise dispose of his interest in the respondent, although even this point is not all that clear. Mr. Zonneveld clearly put his mind to the possibility of continuing to operate the respondent even if the union were certified, as indicated by his concerns about operating without certain "key" employees who might leave if the union were certified. We would note also Mr. Zonneveld's claim that he was concerned with being stuck with the grievors if the union came in. In our view, the statements made by both Jack and Leen Zonneveld to employees (and further spread by Miss Vandervelde) about the business being closed had the effect of unlawfully equating support for a union with a loss of employment. It is our opinion this tie-in between support for a union and loss of employment means that the true wishes of employees concerning union representation are not likely to be ascertained in a representation vote. In reaching this determination we have taken into account, but not given much weight to, the statements by certain of the union's witnesses on cross-examination that they would vote according to their own wishes in any representation vote. We feel such comments by strong union supporters is not of much assistance in seeking to determine the effect of the respondent's actions and the statements of Jack and Leen Zonneveld on the other employees.

45. A final precondition which must exist before the Board can certify a union pursuant to section 7a is that it have membership support adequate for the purposes of collective bargaining. Counsel for the respondent indicated that he would not dispute that this condition had been met. As noted above, the union filed evidence of membership on behalf of at least fifty per cent of the employees in the bargaining unit. The statements of desire in opposition to the application bear the signatures of 7 employees who had signed union cards. The group of objecting employees decided not to continue to participate in the hearing after it was established that the union fell short of the fifty-five per cent membership position which would make the statements of desire relevant to the issue of the Board's discretion to direct the taking of a representation vote under section 7(2). Because of this lack of participation the group of objecting employees did not lead any evidence concerning the voluntariness of the statements of desire. The evidence of the witnesses called by the union, however, indicates that the statements were circulated on the respondent's premises under circumstances where union supporters might have reasonably signed such a document out of concern that the individuals circulating the statements had at least the tacit support of management, and that management might come to be aware of any refusal on their part to sign. This being the case, the Board is not prepared to give much weight to the statements of de-

sire insofar as they go to the issue of the union's support for the purposes of collective bargaining. On the basis of all the material before it, and particularly the degree of support for the applicant union indicated by the evidence of membership filed in these proceedings, the Board is of the opinion that the applicant trade union has membership support adequate for the purposes of collective bargaining. Accordingly, the Board is satisfied that the applicant has established its right to be certified pursuant to the provisions of section 7a.

46. As indicated above, the parties did not fully agree upon the list of employees in the bargaining unit on the date of the making of the application. The Board's determination with respect to the section 79 complaint, and its finding that Miss Vandervelde does not exercise managerial functions, means that only two persons remain in dispute, and the dispute concerning them relates simply to the question of whether at the time of the filing of the application they were regularly employed for sufficient hours to put them in the bargaining unit, or whether they were excluded from the unit on the basis of the part-time exclusion. In our view, the question of whether these two persons did or did not come within the part-time exclusion from the bargaining unit on the date of the making of the application is now an academic issue. Accordingly, we do not believe that any useful purpose would now be served by pursuing the union's challenge to the names of these two persons being included on the list of employees.

47. A certificate will issue to the applicant.

48. During the hearing counsel for the union indicated that the union was sensitive to the fact that a number of bargaining unit employees might object to the union on religious grounds. Counsel further indicated that if union membership or payments of dues or other assessments to the union were to become a condition of employment these employees might want to take advantage of the provisions of section 39 of the Act. Section 39 essentially provides that if an employee because of his religious conviction or belief objects to joining a union or making payments to a union, then during the term of a first collective agreement containing such a requirement an employee can apply to the Board for an order that the relevant collective agreement provisions not apply to him and that the equivalent to any monies that the employee would otherwise pay the union be instead paid to a charitable organization.

1878-79-R Teamster Local Union No. 647, Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **T.R.S. Food Services Limited**, Respondent, v. Hotel & Restaurant Employees' & Bartenders' International Union (affiliated with the CLC), Intervener.

Bargaining Unit – Certification – Whether food service operation bargaining unit client specific or municipal wide.

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members J. D. Bell and C. Ballentine.

DECISION OF VICE-CHAIRMAN PAMELA C. PICHER AND BOARD MEMBER C. BALLENTINE; April 24, 1980.

1. By a decision dated March 4, 1980 the Board certified the applicant, Teamsters Local Union No. 647, on an interim basis as bargaining agent for the full-time bargaining unit pending the Board's final determination of the geographic scope of the bargaining unit.
2. As set out in the Board's March 4th decision, the bargaining unit dispute between the applicant and respondent, a food service employer, relates to the appropriate geographic scope of the unit. The applicant requests that the unit be described solely by reference to the municipality and not the particular client serviced by the respondent's employees, in this case, General Motors of Canada. Accordingly, the description put forward by the applicant is, "all employees of the respondent, working in St. Catharines, save and except ...". The respondent, on the other hand, seeks to have the Board describe the unit by reference to the client company. The respondent's requested description, therefore, would read, all employees of the respondent working in or out of the General Motors of Canada Limited plants in St. Catharines, save and except ...".
3. Presently, the only food service operation carried on by the respondent in St. Catharines is at the General Motors plants. The respondent, however, is actively seeking other contracts. The significance of the geographic designation is that if the union is certified for "all employees of the respondent in St. Catharines", bargaining rights would automatically cover employees of the respondent working at additional places of business in St. Catharines for which the respondent obtains a contract to provide food service.
4. Where an employer has only one location within a municipality, the Board's consistent practice, apart from the construction industry, has been to describe the geographic scope of the bargaining unit by reference to the municipality rather than the respondent's particular location. This practice results from a balancing of two competing interests: the individual's interest preserved by section 3 of the Act to be free to join a trade union of his own choice, on the one hand, and, on the other, the concern of the Board as well as the union and employees involved in any particular case that sufficient stability adhere to the bargaining rights conferred. (See generally the Board's decisions in the *Great Atlantic & Pacific Tea Company Limited*, [1969] OLRB Rep. Jan. 1017; *Perimeter Industries Limited*, [1973] OLRB Rep. Mar. 174; *Wix Corporation Limited*, [1975] OLRB Rep. Aug. 637; *Inglis*

Limited, [1977] OLRB Rep. Mar. 128; and *York Steel Construction Limited*, decision dated February 25, 1980, File No. 1501-79-R, as yet unreported).

5. While limiting a bargaining unit to the respondent's particular location would give considerable latitude to an individual's freedom to join a trade union of his own choice, it could, at the same, jeopardize the stability of the bargaining rights conferred upon the union. If an employer moves the location of its operation in a situation where the bargaining unit has been defined by reference to the employer's street address, the union's bargaining rights may be extinguished by the move. The Board's general policy of describing the geographic scope of a bargaining unit by reference to the municipality in which the employer's operation is situated instead of the particular location inhibits bargaining rights from being disturbed in this manner.

6. In recognition of an individual's right to choose his own bargaining agent, the Board insures that the geographic boundary of a bargaining unit is not drawn too broadly. See, for example, the Board's decision in *Canada Safeway Limited*, [1972] OLRB Rep. Mar. 262 where the Board refused to extend the scope of the bargaining unit beyond the municipality because of the broad restriction that would otherwise be placed on the employees' freedom to choose their own bargaining agent. By drawing the geographic boundary of the bargaining unit at the municipal line, the Board has sought to maintain an appropriate balance. Moderate restrictions are placed on an individual's freedom to join a trade union of his own choosing in an effort to promote a very important measure of stability for the bargaining rights conferred. Admittedly, the line drawn is somewhat rough and ready. To whatever extent it is unresponsive to the needs of the parties in any particular case, adjustments may be made by agreement of the parties.

7. In this case the respondent has asked the Board to depart from its normal practice of describing the bargaining unit by reference to the municipality in circumstances where the respondent has only one location. In support of its position, the respondent emphasizes that the bargaining unit description it has requested refers generally to the client being serviced by the respondent's employees, rather than the client's street address. The respondent argues that because such a description would ensure that bargaining rights would follow the client anywhere it might move in St. Catharines, the stability of the bargaining rights is not at risk.

8. The Board is of the view, however, that notwithstanding the absence of the street address, the respondent's proposed geographic description would unnecessarily strain the stability of the bargaining rights. The permanent relationship of the employees involved in this application is with the respondent, T.R.S. Food Services Limited, and not with the respondent's client, General Motors. While some clients in the food service industry may develop a relatively permanent relationship with a particular company engaged in the food service business, neither the length of the contract for food service nor its continual renewal may be taken for granted. To tie the continuation of the applicant's bargaining rights to the client being serviced by the respondent would mean that the bargaining rights would be placed in a position of complete dependence on the continuation of the food service contract which existed between the employer and the particular client being serviced at the time of the application for certification. Given the fluctuations of the market place and the competition for such contracts, the Board concludes, on balance, that where the employer has but one location in the municipality, the geographic scope of the bargaining unit should be defi-

ned by reference to the municipality in which the respondent is located. We note that in circumstances where an employer has two or more locations in a municipality, additional considerations relating to the actual community of interest shared between the particular locations may become relevant.

9. For the reasons given above the Board declines to depart from its normal practice of defining the geographic scope of the bargaining unit by reference to the municipality in circumstances where the employer has only one location within the municipality. Accordingly, the Board finds that all employees of the respondent in St. Catharines, Ontario, save and except supervisors, persons above the rank of supervisor, chefs, office and clerical workers, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

10. A formal certificate will now issue.

DECISION OF BOARD MEMBER J. D. BELL:

1. I dissent from the decision of the majority.

2. When the factors outlined in the majority decision are applied to the food service industry in which the respondent is engaged, considerations prevail that are somewhat different from those that apply to bargaining rights in the typical retail outlet, food market chain or industrial plant. This difference was previously noted by the Board in *V-S Services Ltd.*, (File No. 1801-76-R, decision dated February 17, 1977, unreported) where the respondent, similar to the respondent in this case, was engaged in the food service business. In *V-S Services*, the Board, in circumstances virtually identical to those before the Board in this case, refused the applicant's request to be certified for the municipality. Instead the Board granted the bargaining unit advanced by the respondent which was restricted to the particular location where the respondent's employees provided their food service. In departing from the practice of certifying a union for a municipal bargaining unit, the Board indicated that neither an industrial plant nor a retail outlet presented circumstances analogous to those for a food service business. The existence of the difference between retail stores and the food service business is further reflected in the many food service cases before the Board where the parties themselves have agreed that the geographic description should be restricted to the location where the employees provide the food service. There are in fact relatively few cases where a food service business has in fact been certified for a municipal bargaining unit.

3. If the Board in this case restricted the bargaining unit to the location of the client being serviced by the T.R.S. employees, the stability of the bargaining rights of the union would not be placed in jeopardy. Describing the geographic scope of the bargaining unit by reference to the plants of General Motors of Canada in St. Catharines, would not fix the bargaining rights to a particular street address as with a retail store operation or a manufacturing plant. Instead the rights would adhere to the respondent's client. If the client moves its location within the municipality, the bargaining rights would continue without disruption. By defining the bargaining unit municipally, according to the client being serviced, the Board is able to avoid unnecessarily reducing the scope of the principle of self-organization in section 3 of the Act without risk to the stability of the bargaining rights the Board has conferred.

4. Two additional factors underscore the appropriateness of this approach for certifications in the food service industry. In that industry the particular needs of the client being serviced have a strong impact on the nature of the business performed by the respondent. To properly service the client, the respondent must be responsive to the client's circumstances and tailor its services to meet those requirements. For example, the food service employees in a given location may have to adapt to conditions such as the shift work and seasonal shutdowns of the host industry. The similarity of business from client to client and the related needs of the food service employees is, therefore, less predictable or uniform than as between employees in different stores of a retail food chain. The labour relations interests of the food service employees will be variously influenced, therefore, by the nature of the operations of the client in whose environment they work.

5. A further consideration which supports a decision to certify food service employees municipally by client rather than on the basis of all locations of the respondent in a municipality is the strain on organizing that would be placed on a union if it had to organize all of the respondent's employees in a municipality. Unlike retail food markets or chain stores, for example, the respondent does not hold itself out to the public in a manner that would reveal the location of its various contracts. In a municipality of any size it would, therefore, be difficult for a union to find and organize all of the locations of the respondent. In that case, to insist on a bargaining unit of all employees of a food service in a municipality would tend to unduly impede the access of the employees to any collective bargaining at all (*Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330.)

6. For the reasons set out above, therefore, I conclude that the appropriate bargaining unit in this case is the one proposed by the respondent.

1201-78-R Labourers' International Union of North America, Local 183, Applicant, v. **Thames Steel Construction Ltd.**, Respondent, v. Employee, Objector.

Certification – Charges – Membership Evidence – Employer alleging improper conduct in obtaining membership – Whether evidence relating to single individual's membership admissible – Whether involvement of employees who exercise some authority in organizing affecting weight of membership evidence – Whether suggestion of higher initiation fee if employees fail to join union during organizing drive affecting membership evidence.

BEFORE: R. A. Furness, Vice-Chairman, and Board Members H. J. F. Ade and O. Hodges.

APPEARANCES: *S. B. D. Wahl and others for the applicant; L. Bertuzzi and M. Pekin for the respondent; W. G. Posthumus and Douglas Grant for the objector.*

DECISION OF THE BOARD; April 30, 1980

1. The applicant has applied for certification with respect to certain employees of the

respondent. In a decision dated May 15, 1979, the Board determined that Antonio Rodrigues and his brother Antonio Jose Rodrigues did not exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act* and are included in the bargaining unit.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(n) of *The Labour Relations Act*.

3. The Board further finds that all employees of the respondent in the Regional Municipality of Halton, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining.

4. The respondent filed allegations of improper or irregular conduct with respect to the evidence of membership filed by the applicant. The respondent alleged that the membership applications filed by the applicant in support of its application for membership were neither an accurate nor voluntary representation of the wishes of each employee. More specifically, the respondent alleged that the evidence was gathered, (i) with the support and influence of persons who are members of management, (ii) by the use of misrepresentation and fabrication of facts and (iii) under circumstances which were threatening, intimidating and coercive to the employees.

5. This application for certification was filed on October 16, 1978, and the terminal date fixed for this application was October 27, 1978. The allegations of improper or irregular conduct which were filed by the respondent allegedly occurred during the period of time from about September 22 until November 1, 1978. The respondent alleged that sections 3, 12, 56 and 61 of *The Labour Relations Act* had either been contravened or were relevant to the disposition of its allegations of improper or irregular conduct.

6. Initially, the Board inquired into the respondent's allegations of improper or irregular conduct. In the course of inquiring into such allegations the Board, in response to the representations of the parties, was called upon to make three rulings with respect to issues which arose before it. Firstly, with respect to membership in the applicant. One of the witnesses called by the respondent was asked by the applicant whether he had signed one of its applications for membership. Counsel for the respondent and the objector objected to this question being put to the witness and relied on the provisions of section 100(1) of *The Labour Relations Act* and also upon what they perceived to be a lack of relevance of that question. The Board ruled that section 100(1) with respect to secrecy of a trade union's evidence of membership provided a privilege which protected the confidentiality of such evidence for the protection of both the trade union and the person or persons who may have signed membership cards in the trade union. The Board further ruled that, subject to its overriding discretion, such privilege might be waived by the trade union and by the person or persons who may have signed membership cards in the trade union. In the instant case, the applicant desired to waive this privilege and the Board had no objection, in the circumstances of this application, to the disclosure of information with respect to whether the witness did or not sign an application for membership in the applicant provided the witness also desired to waive this privilege. The Board advised the witness that he was not required to answer the question if he did not want to answer it. The witness was advised that the Board

would not compel him to answer the question. The Board also ruled that it would permit the applicant to put this question to the witness because it was not satisfied that the question was irrelevant and that this point could be argued after the presentation of all the evidence. The circumstances of this case were that the respondent was endeavouring to establish that persons in the bargaining unit had been induced to sign membership cards by the use of conduct which contravened certain sections of *The Labour Relations Act*. In addition, it was argued that the parties to this proceeding generally knew who had and who had not signed membership cards in the applicant. The respondent's work force was predominantly composed of two groups of employees. It was known, and the parties sought to demonstrate beyond all doubt, that while the employees who were born in Portugal overwhelmingly supported the applicant and signed membership cards in the applicant, the employees who were born in Korea to a man did not support the applicant and did not sign membership cards in the applicant.

7. Secondly, the respondent argued that it ought to be permitted to call evidence with respect to its allegations that the membership applications which the applicant had submitted in support of its request for certification were not an accurate or voluntary representation of the wishes of each employee who signed membership applications in the applicant for the entire period from about September 22 until November 1, 1978. The objector supported the respondent in this position. The applicant opposed the respondent on this point and argued that the Board ought to permit the respondent to adduce such evidence up to the point in time when the respondent's employees last signed membership cards in the applicant. The Board ruled that the date proposed by the applicant would be unknown to the other parties and that the respondent would not be restricted to calling its evidence in the manner proposed by the applicant. The Board further ruled that since the respondent was challenging the accuracy or the voluntary representation of the wishes of the employees who signed applications for membership, the respondent would be permitted to adduce evidence with respect to its allegations for the period of time from about September 22, 1978, until October 27, 1978. The Board pointed out that October 27, 1978 was the terminal date for this application and that the terminal date was the last day on which the applicant could have secured and filed with the Board in a timely manner evidence of membership.

8. Thirdly, at the commencement of the continuation of the hearing on October 15, 1979, the respondent filed the following document:

"PARTICULARS

#1201-78-R

On or about September 1979 an employee who had given evidence adverse to the union before the Labour Relations Board was confronted in the company's locker room in the presence of a number of employees by J. Costa and A. Valentin and was threatened with physical harm if he carried on with his testimony before the Board. This employee has also received threatening phone calls regarding his testimony during this time period.

Counsel for the respondent asked for the guidance of the Board and stated that these "particulars" took place in the last month. Counsel for the respondent asked the Board to hear the evidence in order to assess the weight of the threatening atmosphere in the plant at the time of the signing of the membership cards. Counsel for the respondent argued that events

taking place after the terminal date could and should be relevant if they shed light on things which occurred prior to the terminal date. Counsel for the respondent characterized this kind of evidence as follow-up evidence and showed a continuing atmosphere which has existed for a year in the respondent's plant. Counsel for the objector argued that the Board should hear evidence with respect to the "particulars" supplied by counsel for the respondent. Counsel for the applicant referred to earlier rulings of the Board in this proceeding with respect to the hearing of evidence of timely allegations which have been filed concerning the conditions under which evidence of membership was obtained. The Board ruled at an earlier stage of this proceeding that it would hear evidence with respect to timely allegations which have been filed concerning the conditions under which evidence of membership was obtained by the applicant. Subsequently, the Board ruled that it would not hear evidence of events which allegedly occurred subsequent to the terminal date but which referred to events which allegedly occurred prior to the terminal date. The Board pointed out that the respondent could have adduced evidence of such events which allegedly occurred prior to the terminal date only if allegations with respect to such events had been filed with the Board in a timely manner in accordance with the Board's Rules of Procedure. In a decision of the majority, Board Member H. J. F. Ade dissenting, the Board ruled that it would not hear evidence with respect to the allegations which were filed on October 15, 1979. The majority of the Board stated that such allegations which had been characterized by the respondent as "particulars" were, in its view, new allegations which did not relate to the conditions under which the evidence of membership was obtained by the applicant. The majority of the Board expressed the view that such allegations might be the subject of a further proceeding under *The Labour Relations Act*.

9. The Board heard many days of evidence. It is more desirable to set forth the arguments of the three parties and then relate such arguments to the evidence of the witnesses rather than to set forth the minutiae of the evidence and then emerge from the labyrinth of evidence and relate the evidence to the arguments of the three parties.

10. The respondent posed as the basic question whether the applicant's membership cards spoke for themselves. The respondent advanced its argument in four positions. Firstly, the membership cards were gathered with the support, assistance and influence of persons who were viewed by the employees of the respondent as exercising some authority with respect to their relationship. The respondent did not suggest that section 12 of *The Labour Relations Act* had been violated but did argue that the membership evidence came into being because of the urging of persons who were in a position to exert undue influence.

11. Secondly, the persons, who gathered the membership evidence and the persons who were the knowing assistants of the gatherers, fabricated facts to be presented to prospective members. It was the respondent's position that this misrepresentation and fabrication cast a doubt on the validity of the evidence of membership. Thirdly, the respondent argued that there was no excuse for threats, intimidation and coercion used to obtain the evidence of membership and urged the Board to test the wishes of the employees in a representation vote. Fourthly, the respondent argued that the primary collector for the applicant had appeared before the Board and had attempted to mislead the Board as to a number of circumstances involved in obtaining the evidence of membership.

12. The objector generally supported the position of the respondent that the evidence of membership had been obtained as a result of threats, intimidation and coercion. The ob-

jector, however, stressed his perception of the interaction between two groups of employees – a group of Portuguese employees and a group of Korean employees and the role of three employees named Rodrigues who worked for the respondent. In the view of the objector, Antonio, Antonio Jose and Manuel Rodrigues wielded considerable influence in the respondent's plant if not in the Portuguese community as a whole. The objector argued that while the positions held by Antonio and Antonio Jose Rodrigues should not be confused with managerial positions, the Board should realize the positions they were perceived to have by other employees.

13. The applicant argued that there was no direct evidence of any improprieties in the evidence of membership. The applicant pointed out that even if certain alleged events did take place, the employees who were involved did not sign membership cards in the applicant. It was stressed that the applicant's organizational drive occurred during the end of August into September of 1978 and that the last membership card was signed on October 19, 1978, just three days after the application was filed with the Board. The applicant stressed that all membership cards were signed before the posting of the green form, that is to say, Form 5, Notice to Employees of Application for Certification and of Hearing, during the evening of October 23, 1978. The applicant conceded that after the posting of the green form "the heat on the shop floor got pretty hot" and while certain confrontations occurred, such incidents did not and could not affect the evidence of membership. It was stressed that the respondent had been unable to bring forward anyone who had been misled.

14. In reply, the respondent stressed what it regarded as the quasi-management roles of Antonio and Antonio Jose Rodrigues coupled with threats and intimidation. It was argued that threats and intimidation by persons who occupied quasi-management roles effectively blocked off recourse by employees to higher management. The respondent adopted the position that if threats and intimidation were not successful it did not make them any the less improper.

15. The Board heard evidence over a period of several months. The witnesses who gave evidence with respect to the allegations of improper or irregular conduct were subject to extensive cross-examination. With the exception of Douglas Grant and George Allen, all of these witnesses spoke English as a second language with varying degrees of proficiency. Some of the witnesses gave evidence through an interpreter and some elected to testify in English. The witnesses who testified in English frequently did not understand the subtle shades of meaning in questions during cross-examination and were generally unable to give precise answers to the questions which were asked. Similarly, the interpreter of Portuguese was unable to differentiate between "foremen" and "supervisor" in interpreting questions. The evidence of the witnesses also indicated inconsistencies and this appeared for the most part to be a function of the lapse in time between the occurrence of certain events and the time of their evidence. In other instances, despite the best efforts of all counsel, witnesses were either unable or unwilling to completely explain certain points for their testimony. For example, Manuel Leitao testified that he had "respect" for the members of the Rodrigues family who worked with him. The Board and counsel endeavoured to determine whether "respect" was used in the sense of being worthy of esteem, or, as contended by counsel for the objector, whether that word was used in the sense of a malevolent fear. In addition, certain evidence strained the credulity of counsel and the Board. For example, two employees whose first language was Portuguese conducted an altercation in English in the presence of a third employee who spoke English only as a second language. It is with these bench marks that the Board has considered the extensive testimony in this application.

16. The respondent argued that Antonio Dionisio, a representative of the applicant, and four employees of the respondent, Antonio Rodrigues, Antonio Jose Rodrigues, Manuel Rodrigues and Jack Costa engaged in deliberate and knowing fabrication of facts in an attempt to gather membership evidence. The respondent further argued that Mr. Dionisio, the primary collector of the evidence of membership, did not really have a good idea of the circumstances under which evidence of membership was collected. In particular, the respondent argued that Mr. Dionisio had tried to keep evidence away from the Board and that in view of the contradictions in his evidence the Board must doubt the information Mr. Dionisio supplied to the person who signed the Form 8, Declaration Concerning Membership Document.

17. The respondent made repeated reference to instances where Antonio Jose Rodrigues and Antonio Rodrigues, who have previously been determined by the Board not to exercise managerial functions within the meaning of section 1(3)(b) of *The Labour Relations Act*, had behaved like bosses towards other employees, had corrected their work and had even told one employee to go home. The respondent also made much of the fact that the two brothers handed out pay cheques and rang a bell to signify the commencement of the lunch and coffee breaks. The respondent also made reference to the claims of Antonio Jose Rodrigues, Antonio Rodrigues and other employees that when the applicant came in, the respondent's supervisors and even Mr. Pekin, an owner of the respondent, would be replaced because they pushed the employees too much. In addition, the respondent pointed to evidence that Antonio Rodrigues had informed Chin Yol Cha that if he joined the applicant when the applicant was organizing the respondent's employees the cost would be one dollar but that if he did not join he would have to pay a penalty of one hundred and twenty dollars.

18. The respondent also referred to the extensive evidence of Mr. Leitao that the Portuguese employees were afraid of the three members of the Rodrigues family and to the evidence that Antonio Jose Rodrigues had told Mr. Laitao that he was a foreman. The incident which involved Mr. Costa and Mr. Leitao was highlighted by the respondent. This incident according to Mr. Leitao's testimony occurred when he was circulating a statement of desire in opposition to the applicant. Mr. Costa waved an angle iron and Antonio Jose Rodrigues banged his hat on a bundle of irons. Mr. Leitao informed the Board that after his incident three employees approached him and told him that they had seen what happened to him and that was why they had signed.

19. The respondent reviewed the evidence with respect to the benefits and wages which were the goals of the applicant and argued that the evidence went beyond good salesmanship and amounted to misrepresentation to the employees. The figure of one hundred and twenty dollars was characterized as giving the impression to the employees that by joining and paying one dollar they would save one hundred and nineteen dollars. The respondent argued that the dispensation given to the applicant by its parent international union to charge only one dollar to join the applicant was not restricted to organizing and was a blanket dispensation for employers such as the respondent for the time being.

20. The objector emphasized that the positions held by Antonio Rodrigues and Antonio Jose Rodrigues should not be confused with management and argued that because of the position in the Portuguese community which they were perceived to have by the Portuguese employees, they wielded considerable influence over the behaviour of such employees. The objector argued that the employees who are affected by this application did not know their

rights. In reviewing the evidence, the objector argued that the applicant had interfered with the employees' free and voluntary wishes.

21. The applicant pointed to the evidence of Sang Won Park that Antonio Rodrigues did not yell, but pointed out poor welding and to his testimony that he had no knowledge that Antonio Jose Rodrigues is the boss. The applicant also pointed to Mr. Park's evidence when Antonio Jose Rodrigues became angry with him and told him to go home and Mr. Park questioned his authority to send him home. Mr. Park did not know who had the power to hire employees and did not know whether the shop foreman, John Streefkierr, or the owner, Mr. Pekin, could dismiss him. Mr. Park also testified that when discussing benefits which the applicant hoped to win, the word "automatic" was not used but that "automatic" was his construction on the words used by Manuel Rodrigues. The applicant drew attention to the fact that when Manuel Rodrigues was pressing a group of Koreans to sign membership cards in the applicant they refused to sign and that Mr. Park, who was apparently acting as their spokesman, informed Manuel Rodrigues that if he persisted he would "go to the company and disclose what you are doing". In addition, the applicant stressed that Mr. Cha told Antonio Rodrigues that he did not have to follow his instructions and was not afraid of him.

22. The applicant referred to the testimony of Mr. Leitao that the claims that the shop foreman and the general foreman could be displaced if the applicant was successful were not believed by the respondent's employees. In addition, it was pointed out that Antonio Rodrigues and Antonio Jose Rodrigues were not present during the signing of membership cards in the applicant (other than for, of course, the signing of their own cards) and that Mr. Park had told Antonio Rodrigues that signing membership cards in the applicant had nothing to do with his work with the respondent. The applicant stressed that Kim Yo had given evidence that Antonio Jose Rodrigues and the applicant had nothing to do with lay-offs from employment. The applicant questioned the veracity of Mr. Leitao's evidence and pointed out that Mr. Leitao had mentioned only the requirement to pay one dollar to join the applicant and had mentioned the figure of one hundred and twenty dollars only after he had been prompted by counsel for the respondent. When given a choice between two figures of one hundred and twenty dollars and one hundred and twenty-five dollars he confirmed that the figure mentioned to him was one hundred and twenty-five dollars. This figure of one hundred and twenty-five dollars is at variance with the evidence of all of the other witnesses who appeared before the Board.

23. The applicant reviewed the evidence of George Allen, a business representative of the applicant. It was conceded by the respondent that Mr. Allen was a truthful witness. Mr. Allen testified that the initiation fee for membership in the applicant was one hundred and twenty dollars and that under a dispensation issued by the general president of the parent international union, the applicant was allowed to organize employees in industries such as the one operated by the respondent by offering membership in the applicant for one dollar. Mr. Allen gave evidence in cross-examination that the dispensation applies during organizing and that apart from this the initiation fee under the constitution is one hundred and twenty dollars. The applicant stressed that Mr. Allen could not say that the initiation fee of one hundred and twenty dollars would in all circumstances be demanded from persons who joined the applicant later and that the dispensation was not a blanket dispensation. The applicant also pointed to the evidence of Dennis Beaulac and Rogerio Botelho that Mr. Leitao was not told that they had seen what happened to him and that was why they had signed. The Board was urged to look at the question of the alleged intimidation and coercion in the

light of the alleged statements to determine if they contained express threats to job security and with respect to alleged implied threats to job security to determine if they would be believed by a reasonable employee. The Board was then asked to determine whether the person who allegedly made the threat was an official of the applicant or a rank and file organizer. The applicant also asked the Board to consider whether employees who were subject to such alleged threats actually signed membership cards in the applicant. The applicant argued that the test to be applied was whether the words allegedly spoken would intimidate and coerce the reasonable employee and emphasized that Mr. Dionisio did not threaten anyone. In the applicant's view of the evidence, Mr. Dionisio acquainted employees with the applicant's efforts and the benefits which the applicant would attempt to secure for the respondent's employees.

24. The evidence before the Board does not establish that Antonio Rodrigues and Antonio Jose Rodrigues were in a position to exert undue influence on the employees. Although these two men attempted to exercise their responsibilities to lead the respondent's employees, they had some difficulty in controlling the employees who worked with them. The ringing of the bell for lunch and coffee breaks and the handing out of pay cheques was not exclusively performed by Antonio Rodrigues and Antonio Jose Rodrigues. Such duties were also carried out by the employees who worked with these two men. It was necessary for John Streefkirk to emphasize to the employees that Antonio Rodrigues and Antonio Jose Rodrigues had to be respected. Mr. Park did not know that Antonio Jose Rodrigues is a boss and questioned his authority to send him home. Mr. Cha told Antonio Rodrigues that he did not have to follow his instructions. While Antonio Rodrigues and Antonio Jose Rodrigues were responsible for checking the work of the employees, correcting errors and making reports to John Streefkirk, the shop foreman, the latter did not always give effect to their views. The evidence, when viewed as a whole, does not establish that these two men either exercised any authority in their relationship with the other employees or were in a position to exert undue influence on the other employees.

25. In the course of the organizing campaign the objectives of the applicant with respect to the future goals for the respondent's employees were mentioned. Wages and fringe benefits were referred to from time to time. On a fair reading of the evidence the Board is not persuaded that there was fabrication of facts and misrepresentation to the respondent's employees. Indeed, it appeared to the Board that the respondent's employees who testified were most certainly neither uninformed nor naive of the realities of industrial relations. In a similar vein, none of the witnesses believed that either the applicant or its supporters had the means to replace the foreman and the owner.

26. There is no evidence before the Board that the applicant or its organizers used threats, intimidation and coercion to obtain evidence of membership. The evidence does establish that there was an intense polarization of feelings for and against the applicant. In our view, the respondent and the objector have emphasized events from this polarization and have attempted to extrapolate such events as reflecting on the applicant's evidence of membership. The Koreans declined to sign membership cards in the applicant and quickly dispatched Manuel Rodrigues when he urged them to sign such cards. It appears to the Board that the Koreans believed that if the applicant was successful in organizing the respondent's employees a system of seniority would be introduced with respect to job security. It further appears to the Board that the Koreans decided against supporting the applicant because of their generally low seniority and the consequently greater risk of lay-offs among

them. Mr. Leitao weighed the risk of supporting the applicant in terms of the economic interest of his family. Despite the fact that his wife supported the applicant, Mr. Leitao confessed his fears to Manuel Rodrigues and freely chose not to sign a membership card in the applicant.

27. With respect to the membership fee for applying for membership in the applicant, the Board has stated on many occasions that there is nothing wrong in a trade union reducing its initiation fee during an organizational campaign. See, for example, *Max Factor and Company*, [1964] OLRB Rep. Feb. 616. The Board is satisfied that Antonio Rodrigues told Mr. Cha that if he did not join at one point in time and pay one dollar he would have to pay a penalty of one hundred and twenty dollars. As the Board stated in *The Kendall Company (Canada) Limited* case, [1975] OLRB Rep. Aug. 611, in all cases alleging improper conduct by a trade union the Board first begins by assessing the nature of the conduct – the test being, “would it deter the reasonable employee”. If the answer to such a question is in the affirmative the Board must go on to assess the possible significance of the conduct and in this regard the identities of those persons involved are very important. Where the improper conduct is that of a responsible official of the trade union, one act of misconduct may be sufficient to cause the Board to conclude that it cannot place reliance on any of the evidence of membership filed by a trade union. On the other hand, where the misconduct arises from evidence of membership procured by a person of lesser rank, the evidence of membership obtained by such a person may be disallowed. Reference was made to the *Alex Henry & Son Ltd.* case, [1977] OLRB Rep. May 288; the *Hancock Sand & Gravel Limited* case, [1978] OLRB Rep. Oct. 928; and to the *Crenmar Services Limited* case, [1978] OLRB Rep. Jan. 48 in connection with the full disclosure of a trade union’s fee structure. The *Alex Henry & Son Ltd.* case involved the failure of a full-time union official to fully disclose a trade union’s fee structure, leaving the clear implication that employees who did not join immediately would have no alternative but to pay a higher fee at a later date if they wished to retain their jobs. In these circumstances, the Board held that the union official had the responsibility to clarify any statements which might be construed by employees as being a threat to their job security. In the *Hancock Sand & Gravel Limited* case and the *Crenmar Services Limited* case, the Board held that it would be unreasonable to expect the same standard from a rank and file organizer as from a full-time union official and reasoned that the rank and file organizer would not likely be perceived by his fellow-employee as being in a position to seek to achieve the consequences of any statements he might make during an organizing campaign. In the *Hancock Sand & Gravel Limited* case, the Board also stated that where employees discuss the merits of joining a union among themselves, it did not seem unreasonable to expect that a few misconceptions might arise and that employees were quite capable of dealing with such misconceptions by seeking any necessary clarification and then making an informed decision as to whether they wish to join a union. In the instant application Antonio Rodrigues was a rank and file employee of the respondent, did not obtain and file with the Board a single membership card in the applicant and did not succeed in persuading Mr. Cha to sign an application for membership in the applicant. In the light of these facts the Board is not prepared to find any irregularity in the evidence of membership filed by the applicant.

28. There remains for consideration the incident between Mr. Leitao and Antonio Jose Rodrigues and Jack Costa with the angle iron and the banging of the hat on a bundle of irons. This incident did not occur in connection with the solicitation of evidence of membership but rather occurred during an attempt by Mr. Leitao to circulate a statement of desire in opposition to this application for certification. Clearly passions were running high. How-

ever, such an incident between three rank and file employees does not support any finding of irregularity in the evidence of membership filed by the respondent.

29. In a decision dated May 15, 1979, the Board set forth its reasons for denying the objector's request for reconsideration of an earlier ruling of the Board that it would not extend the terminal date of this application. In a letter to the Board dated August 23, 1979, counsel for the respondent referred to his earlier letter dated December 13, 1978, and stated:

"I enclose a copy of my letter dated December 13, 1978.

I also wish to refer you to the decision of the Board dated May 15, 1979 and in particular paragraph 7 of that decision. It is my submission that the arguments referred to in that paragraph as raised by myself included the argument set out in my letter, namely the jurisdiction of the Board in view of the fact that the terminal date set by the Board was less than 5 days after the personal service of the notice of application on the employers.

Would you kindly ask the Board to confirm in writing that:

- (a) I raised the argument about Regulation 551 and the fact that there were only 4 days after the delivery of the notice of application and the terminal date; and
- (b) the argument that accordingly the hearing was improperly constituted in that the Board had no jurisdiction to disregard its own Regulations; and
- (c) the Board ruled with respect to these arguments that they could have been raised earlier by Mr. Grant and accordingly the Board would not reconsider its decision not to extend the terminal date."

30. Counsel for the respondent raised before the Board the matters referred to in the preceding paragraph. The Board concluded that it did have jurisdiction to conduct the hearing of this application. The Registrar acted in accordance with the Board's Rules of Procedure and *The Labour Regulations Act* in the service of notices of application and the fixing of the terminal date.

31. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 27, 1978, the terminal date fixed for this application and the date which the Board determines, under section 92(2)(j) of *The Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

32. Having regard to the finding in the previous paragraph it is not necessary for the Board to inquire into the applicant's allegations with respect to section 7a of *The Labour Relations Act*.

33. A certificate will issue to the applicant.

1095-79-U; 1096-79-U Zoltan Zahoransky, Complainant, v. Michael Hren, Gamal R. Badawoy and Local 576, Ontario Public Service Employees Union, Respondents, v. **Toronto East General and Orthopaedic Hospital Inc.**, Intervener.

Duty of Fair Representation – Union executive gathering petition seeking dismissal of grievor – Employer discharging grievor – Union referring discharge to arbitration – Arbitration Board dismissing grievance – Union refusing to apply for judicial review – Whether refusal of application for judicial review violation of section 60 – Whether earlier conduct cured by arbitration proceeding.

BEFORE: Ian C.A. Springate, Vice-Chairman.

APPEARANCES: Elliott G. Posen for the complainant; George Richards, Gamal Badawoy and Richard Nabi for the respondents; Janice Baker, James D. Van Camp and Graham Sellar for the intervener.

DECISION OF THE BOARD; April 16, 1980.

1. These proceedings are hereby consolidated.
2. The complainant alleges that he has been treated by the respondents contrary to the provisions of section 60 of the Act. Section 60 provides as follows:

“A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”
3. On May 1, 1978 the complainant was discharged from his position as senior blood bank technologist at the Toronto East General and Orthopaedic Hospital (“the Hospital”). He had been employed at the Hospital for some eleven years, four of them as senior blood bank technologist. At the time of his discharge the complainant was a member of a bargaining unit of paramedical personnel represented by Local 576 of the Ontario Public Service Employees Union (“OPSEU”). The respondent G. Badawoy was at the time the president of Local 576 while Mr. Hren was the complainant’s union steward.
4. There is nothing in the evidence to indicate that prior to the events giving rise to these proceedings the complainant was singled out for improper treatment by Local 576, OPSEU’s provincial office, Mr. Badawoy or Mr. Hren. The complainant had assisted in the initial organization of the bargaining unit and for a short period had served as president of Local 576. In 1977 a grievance filed by the complainant concerning his hours of work was

taken to arbitration by the union, albeit unsuccessfully. In 1978 the complainant filed two grievances which were resolved to his satisfaction during the grievance procedure. With respect to all three of these grievances the complainant received the active assistance of Mr. M. Campbell, an OPSEU staff representative.

5. On Tuesday, April 25, 1978, a Toronto daily newspaper reported that in March of that year a patient at the Hospital had been administered the wrong type of blood. Although no challenge was ever made to the accuracy of the newspaper report, the staff of the Hospital became very upset that the error involved should have become public knowledge. For some reason a number of staff members concluded that the complainant had provided the information about the error to the newspaper. It is worth stressing at this point that at the hearing all of the parties either expressly or by implication acknowledged that the complainant had not, in fact, been the one to provide the information to the newspaper. It should also be noted that at no time did anyone contend that the complainant bore any responsibility for this particular error.

6. On Wednesday, April 26, 1978, a notice was posted in the Hospital indicating that there was to be a meeting on the following day concerning the newspaper article. The notice was addressed to the staff and signed by Mr. Hren as union steward. The meeting was held on April 27th in the blood bank department. Some thirty-five to thirty-nine persons attended the meeting, including not only personnel from the paramedical bargaining unit, but also a number of nurses involved in the administration of blood and certain persons employed in relatively junior managerial positions. Among the latter was Mrs. Kvas, the charge technologist to whom the complainant reported.

7. Just before the meeting of April 27th got underway, Mr. Hren closed the door of the meeting room and placed a table against the door. He then sat on the table and proceeded to open the meeting. Much of the meeting consisted of a discussion concerning the release of medical information to persons outside the Hospital. During the course of the meeting Mrs. Kvas began to question the complainant concerning certain alleged errors in the blood bank. The complainant declined to answer these questions in front of the assembled group. According to the complainant's uncontradicted testimony, when he indicated at one point that he did not have to answer a question, the others present began to chant in unison "yes, you do, yes, you do." Later during the meeting Mr. Hren called for the resignation of the "suspect" responsible for leaking the information about the mismatched blood to the press. Mr. Hren also indicated that if the suspect did not resign a petition would be circulated with respect to him.

8. The day after the meeting, Friday, April 28th, was a day off for the complainant. During the day a petition addressed to three senior members of the Hospital administration was circulated among the staff. The petition reads as follows:

"We the undersigned demand the dismissal of Mr. Zoltan Zahoransky by Tuesday, May 2nd, 1600 hours. If action has not been taken by that time we will withdraw our services until such time as he is dismissed."

The petition was signed by a number of employees and charge persons, including Mrs. Kvas. Among the employees signing were Mr. Hren, the complainant's union steward and Mr. Badawoy, the president of the union local.

9. The complainant returned to work on Monday, May 1, 1978. He was at the time working on the 4:00 p.m. to midnight shift. During his shift the complainant was called into a meeting with Mr. James Van Camp, the associate executive director of the Hospital, Mr. G. Sellar, the Hospital's personnel manager, Mrs. Kvas and Mr. Badawoy. The complainant testified that because of Mr. Badawoy's presence he concluded that the meeting was to be disciplinary in nature. The complainant further testified that he felt he would not be adequately represented by Mr. Badawoy and accordingly asked for a representative from the union's head office. It is of some interest to note that at the time the complainant raised his concern about Mr. Badawoy's presence, he had not yet seen the petition and hence was unaware of the fact that Mr. Badawoy had been one of those who had signed it. Mr. Van Camp advised the complainant that he could telephone Mr. Campbell, the OPSEU staff representative who had represented him in the past. According to the complainant, he did not think he would be able to contact Mr. Campbell because he did not know Mr. Campbell's phone number and also because Mr. Campbell lived some distance outside of town. The complainant's uncontradicted testimony was that when at the meeting he explained that he did not think that he could get in touch with Mr. Campbell, Mr. Van Camp indicated that the meeting would proceed and also that Mr. Badawoy was there to assist the complainant.

10. Once the meeting on May 1st got underway, Mr. Van Camp showed the petition to the complainant. In doing so, Mr. Van Camp stated that the petition should not have a bearing on the matters before them. The complainant was then questioned by Mr. Van Camp, Mr. Sellar and Mrs. Kvas concerning certain alleged breaches of confidentiality and certain alleged acts of incompetence. Mr. Van Camp also posed two questions which were answered by Mr. Badawoy. One question concerned how you would recognize an entered unit, to which Mr. Badawoy correctly replied you can see the injection site. The other question was whether the mismatching of blood could have serious implications. The response of Mr. Badawoy was that it could. At the hearing the complainant indicated that this reply by Mr. Badawoy was correct in certain situations but not in others. Apart from answering Mr. Van Camp's questions, Mr. Badawoy apparently took no active part in the meeting.

11. The meeting on May 1st ended with Mr. Van Camp, Mr. Sellar and Mrs. Kvas retiring from the room, and some time later returning to hand the complainant a hand-written letter of discharge. The letter reads as follows:

"May 1, 1978

Mr. Zoltan Zahoransky
Senior Blood Bank Technologist
Toronto East General Hospital

Mr. Zahoransky

This document will serve to inform you that you are being discharged immediately from your position as senior blood bank technologist at the Toronto East General Hospital for the following reasons:

- 1) Incompetency & carelessness.
- 2) Breach of confidentiality of patient records.

You are being discharged as the result of both of these incidents separately as each of these reasons in and of themselves would lead to your discharge.

Any monies owing to you by the Hospital will be forwarded by registered mail.

(sgd.) James D. Van Camp
Associate Executive Director"

12. Following his discharge the complainant contacted Mr. Campbell, the OPSEU staff representative. Mr. Campbell apparently assisted the complainant in grieving his discharge. When the grievance was not settled, the matter was taken on to arbitration. Although the arbitration was conducted in the name of Local 576, in fact all arrangements for the arbitration appear to have been handled on behalf of the union by Mr. Richard Nabi, OPSEU's co-ordinator of grievances and classifications. To present the union's case before the arbitration board, a lawyer experienced in labour relations matters was retained by the union. The hearing before the arbitration board lasted three days. Although the complainant stated that in retrospect the union's case might have been handled differently at the arbitration hearing, there appears to be no question but that a strong defence was mounted in support of the complainant at the hearing.

13. On or about March 2, 1979 the chairman of the arbitration board issued his award in which the Hospital nominee on the board concurred. The union nominee issued a dissent to the chairman's award which prompted an addendum by the chairman dated March 22, 1979.

14. The chairman of the arbitration board found that the complainant had made a number of errors in the course of his duties between January 16, 1977 and April 25, 1978. With respect to the April 25th incident, the chairman concluded that the complainant had cross-matched a donor unit of blood for a patient which had already been entered and was not as full as a normal unit. In reaching this conclusion the chairman rejected the complainant's contention that at the time he had cross-matched the unit it was full and unentered, and that someone must have later entered the unit and removed some of the blood in order to "get" him. With respect to the incidents prior to April 25th, the chairman concluded that they could be considered in determining the appropriate discipline for the events of April 25th. In reaching this conclusion, the chairman was of the view that although notes issued to the complainant as well as oral warnings concerning these earlier incidents had not been recorded in a central personnel file, as was the Hospital's general practice with disciplinary matters, and although the notes issued to the complainant were not specifically identified as being disciplinary, nevertheless, they constituted a record of progressive discipline in that they would have informed the complainant that his work was unsatisfactory and that his job was in jeopardy if he did not improve. Taking these considerations into account, as well as the standard of conduct to be expected in a hospital environment, the chairman of the arbitration board concluded that the Hospital did have proper cause to discharge the complainant. The final portion of the award reads as follows:

"In applying the principles enunciated in the foregoing cases to this fact situation, it is clear that the conduct of the Grievor, on several occasions, fell far short of the standard of performance to be expected of an employee in his position. I am satisfied that the Hospital personnel made efforts to correct the situation and that the Grievor was fully aware of his employer's dissatisfaction with his level of performance and with the potential circumstances of a failure to comply with the employer's wishes. The pattern of conduct would indicate that the Grievor was not prepared to make the necessary adjustments and to meet the standard of performance reasonably required by the employer and that the termination of his employment constituted a reasonable and proper disciplinary response on the part of the Hospital."

15. The arbitration board was of the view that there was no evidence to support the suggestion that the complainant had provided any information to the press, although it did conclude that to assist his position in an earlier arbitration the complainant had copied certain information from patient records. The chairman indicated that he did not put much weight on this particular episode. With respect to the petition demanding the complainant's discharge under threat of a withdrawal of services by other employees, the chairman of the board of arbitration had the following to say:

"There was an unfortunate coincidence of timing in that the discharge of the Grievor coincided with certain articles in the press relating to the Hospital and the fact that the Grievor had admittedly made copies of Hospital records may well have created in the minds of Hospital employees and officials a suspicion that the Grievor was responsible for providing the information to the press. There is, in fact, no evidence in support of any such suggestion. That suspicion most likely gave rise to the petition of other members of the Hospital staff which was referred to in evidence to the effect that those employees demanded the dismissal of the Grievor and, in lieu thereof, threatened to withdraw all services until he was dismissed. *I am satisfied on the evidence that while that petition existed to the knowledge of the Hospital, the decision of discharge itself primarily related to the incidents previously enumerated.* The Hospital expressly disclaimed any reliance on that petition in reaching its conclusion and Dr. Hart stated that he personally did not believe that it was the Grievor who leaked the information to the press." [Emphasis added]

16. Following the release of the arbitration award, the complainant approached Mr. Sean O'Flynn, the president of OPSEU, and asked that the union apply to have the award judicially reviewed. Subsequently, Mr. Nabi, the union's co-ordinator of grievances and classifications, was asked to prepare an opinion letter concerning a possible application for judicial review for consideration by Mr. O'Flynn. After discussing the matter with the lawyer who represented the union at the arbitration hearing, Mr. Nabi on April 23, 1979 recommended against taking the matter to judicial review. The relevant portion of Mr. Nabi's recommendation is set out below:

"After considering all of the aspects of this case that appear relevant, I

have determined that it would not be prudent for the Union to seek judicial review in this matter. This then, is my recommendation to the President and I anticipate that the President will concur with my decision.

I believe that the union has made every reasonable effort on behalf of our Brother Zahoransky to provide relief against his misfortune. While the dissent of our Brother Allan Millard adequately points out some of the deficiencies in the award itself, I am assured that there is no better than a 35 per cent chance for success before the courts. Even if we were successful with judicial review I am sure we could look forward to only having a 'trial de novo' and, then we would have to go through the arbitration process all over again. If we found ourselves in that position it is my view that we would stand a lesser chance of success since, the employer's counsel would be able to judge from his mistakes in the earlier arbitration what evidence was required and how it should be adduced. The employer is now familiar with all the union arguments and the Union have [sic] essentially learned nothing from the employer's case. Therefore, it is highly unlikely that a second arbitration of the case would be successful.

Even though money is not the most important consideration it still is a consideration and it is my view that the Union has amply supported this case with available funds. To add now to the cost of the arbitration and to our legal fees would in my estimation simply be wasting money. The money spent so far by the Union in this case has been substantial and in my view, indicates that we have done everything that could be reasonably expected of a good Union in cases such as this."

At the hearing Mr. Nabi added to these reasons by explaining that in his view, even if the chairman of the arbitration board had reached certain erroneous conclusions, he had not left much room for a successful judicial review of his decision. On May 14, 1979 Mr. O'Flynn, the president of OPSEU, wrote to the complainant informing him that the union was not prepared to seek judicial review of the arbitration award. The reasons given by Mr. O'Flynn were essentially those set out by Mr. Nabi in his above-quoted recommendation.

17. Subsequent to the union's decision not to apply for judicial review, the complainant retained his own legal counsel. On June 22, 1979 the complainant's counsel wrote to Mr. Nabi and put to him the following three questions:

- "1. Will O.P.S.E.U. authorize its own solicitor to undertake an application for judicial review on behalf of Mr. Zahoransky?
2. If the Answer to Question No. 1 is no, will the Trade Union authorize Mr. Zahoransky to undertake the application for Judicial review by retaining his own Solicitor who in the process will be representing the Trade Union?
3. If the answer to Question No. 2 is Yes, under what terms will the

Trade Union authorize Mr. Zahoransky to proceed to Judicial review?"

18. By letter dated June 28, 1979, Mr. Nabi indicated to the complainant's counsel that OPSEU was not willing to retain its own solicitor to seek judicial review of the arbitration award, but that it would allow the complainant to use the union's name for such an application if one precondition was met. This precondition was set out in the following terms:

"The union, however, is prepared to allow your client to pursue an application for judicial review under one condition. We ask that before application is made for judicial review, Mr. Zahoransky and his legal spouse both, execute and deliver to us, a document indemnifying the union for any costs that may be awarded against the union in the event that the application is unsuccessful. Since costs and possible damages were of major concern to our organization at the time we originally considered taking action on behalf of your client, we could not in good conscience allow you to proceed in our name without receiving the aforementioned indemnification."

Mr. Nabi testified that the union sought to have the complainant's wife sign the indemnification because although she was employed the complainant was not, and the union was concerned that he would not be capable of paying any costs awarded against the union if an application for judicial review proved to be unsuccessful.

19. The complainant objected to the requirement that his wife sign an indemnification, and apparently she herself declined to do so. By letter to the complainant's solicitor dated July 30, 1979, Mr. Nabi raised the possibility that the complainant might offer some other alternative to having his wife sign the indemnification. Mr. Nabi testified that he had been willing to consider any reasonable alternative, such as a relative of the complainant offering a personal guarantee. The only alternative put forward by the complainant was that he alone sign the indemnification, a proposal which was unacceptable to the union. Following this stand-off, the complainant filed the complaints giving rise to these proceedings. It might be noted that at the time of the hearing into the complaints the complainant was still unemployed.

20. The position taken by the complainant is that Mr. Hren and Mr. Badawoy, acting on behalf of Local 576, violated section 60 of the Act by their actions connected with the complainant's dismissal and, more particularly, by their involvement with the petition. Counsel for the complainant submitted that it was the threat of a work stoppage contained in the petition which in fact had led to the complainant being discharged by the Hospital. In his filings, the complainant also alleged that the union's decision not to seek judicial review of the arbitration award was a breach of section 60. By way of remedy, at the hearing counsel for the complainant submitted that the Board should direct Mr. Hren and Mr. Badawoy to financially compensate the complainant and also direct the union to seek judicial review of the arbitration award.

21. The representative of the union took the position that Mr. Badawoy and Mr. Hren had not signed the petition in their capacity as union officials, but rather as individual employees. He further contended that at the relevant time both Mr. Badawoy and Mr. Hren

would have been concerned with their reputations, and for them not to have joined in signing the petition might well have resulted in their being ostracized by the other employees. The union representative also referred to the finding of the arbitration board that the Hospital's decision to discharge the complainant primarily related to matters other than the petition.

22. The Board proposes to deal first with the allegation that section 60 of the Act was breached by the decision of OPSEU not to make an application for judicial review with respect to the award of the arbitration board. Section 60 cannot reasonably be interpreted to require a trade union to make an application for judicial review with respect to every adverse arbitration award. Rather, the requirements of the section would be met if in considering a possible application for judicial review a union does not act in a manner that is arbitrary, discriminatory or in bad faith. In the instant case the recommendation that no application for judicial review be filed was made by Mr. Nabi after consulting with legal counsel about the matter. The final decision was made by Mr. O'Flynn who, it is to be remembered, had earlier discussed the matter with the complainant. There is absolutely no basis for concluding that either Mr. Nabi or Mr. O'Flynn harboured any ill will towards the complainant or that they treated his case any differently than they would have if some other individual had been involved. Instead, all indications are that both Mr. Nabi and Mr. O'Flynn put their minds to the chances of success in the matter and without any malice or ill will decided that the chances of ultimate success did not justify the expenditure of additional union funds. Whether or not one agrees with their assessment, it cannot reasonably be said that they acted in a manner that was arbitrary, discriminatory or in bad faith such as to constitute a violation of section 60.

23. As for the union's condition for allowing its name to be used in an application for judicial review commenced by a solicitor retained by the complainant, here again no breach of section 60 has been made out. Having decided against filing an application for judicial review because of what it perceived to be the poor chances of success of such an application, it was not unreasonable for the union to seek to ensure that if its name were used in an application for judicial review filed by the complainant's own solicitor, the union would be indemnified for any costs awarded against it if the application proved to be unsuccessful. Mr. Nabi was of the view that the complainant lacked the financial resources to indemnify the union, and accordingly he sought to ensure that the money would be available from some other source. Although he initially proposed that the complainant's wife sign an indemnification, when this was not accepted Mr. Nabi indicated that he was open to other suggestions. At no time did Mr. Nabi's actions in this regard indicate that he was acting in a manner that was arbitrary, discriminatory or in bad faith.

24. Having regard to the above conclusions, and generally to the actions of OPSEU subsequent to the complainant's discharge, the Board is satisfied that at all times after the discharge the union met its obligation to fairly represent the complainant and that its actions did not involve a breach of section 60 of the Act.

25. The Board now turns to consider the events prior to the complainant's discharge. Mr. Hren, the complainant's union steward, was the person who called and opened the meeting on April 27, 1978. It was also Mr. Hren who proposed the circulation of a petition against the "suspect" responsible for leaking information to the press. Both Mr. Hren and Mr. Badawoy, the local's president, signed the petition, indicating that they would take part

in what could only have been an unlawful work stoppage if the complainant were not discharged. As noted above, the union representative contended at the hearing that Mr. Hren and Mr. Badawoy were at the time acting as individual employees and not in their capacity as union officials. However, neither of these gentlemen came forward to testify to that fact at the hearing. More importantly, there is nothing to indicate that either of them made such a statement at the meeting on April 27th or at the time that they signed the petition. When Mr. Hren signed the notice informing the staff of the meeting on April 26th, he expressly signed it as union steward and he also took an active leadership role during the meeting itself. Taking all these considerations into account, the Board is not prepared to infer that at the relevant time either Mr. Hren or Mr. Badawoy were acting simply as individual employees and not as representatives of Local 576.

26. There may well be situations in which a union official is justified in requesting that management remove an employee from the workplace. One example that comes to mind is that of an employee who consistently engages in unsafe conduct which poses a direct threat to the well-being of other bargaining unit employees. Even where a union official is concerned with the continued presence of an employee in the workplace, however, he must bear in mind that he still owes a duty of fair representation to that particular employee. The union official owes it to the employee to address himself to the merits of any allegations raised against the employee and not demand his removal simply on the basis of rumour or unfounded suspicions. In the instant case Mr. Hren and Mr. Badawoy engaged in conduct specifically designed to achieve the complainant's discharge. Their actions appear not to have been preceded by any investigation of the facts surrounding the leaking of the information to the press, and at no time did they give the complainant a reasonable opportunity to respond to the allegations against him. On the evidence led at the hearing, the Board is drawn to the irresistible conclusion that neither Mr. Hren nor Mr. Badawoy even addressed himself to the merits of the allegations against the complainant. In other words, they demanded his discharge solely on the basis of false rumours and unfounded suspicions which they never bothered to investigate or seek to verify. Such a cavalier and insensitive approach to something as important to the complainant as his continued employment can only be described as shocking. The Board has no hesitation whatsoever in concluding that the conduct of Mr. Badawoy and Mr. Hren, and through them Local 576, indicated such a non-caring attitude towards the complainant as to amount to arbitrary conduct in violation of the union's duty to the complainant under section 60 of the Act.

27. The Board rejects completely the contention raised at the hearing that Mr. Hren and Mr. Badawoy were required to act in the manner in which they did in order to avoid being ostracized by the other employees. Union officials cannot justify their demand for the discharge of an employee on the basis of a need "to go along with the crowd" when the crowd itself is acting on the basis of rumours and unsupported suspicions. One of the very purposes of section 60 is to protect individual employees from majority employee conduct when the majority is acting in an arbitrary manner.

28. The complainant did not allege that Mr. Badawoy's attendance at the meeting of May 1, 1979 which culminated in the complainant's termination involved a violation of section 60. With respect to this incident the Board would simply note that if only as a matter of judgment, since he had signed the petition demanding the complainant's dismissal, Mr. Badawoy should have disqualified himself from the meeting and himself attempted to arrange for someone else to attend on behalf of the union.

29. As indicated earlier, counsel for the complainant contended that it was the union's breach of section 60 related to the petition which had caused the complainant's discharge, and on this basis he requested both monetary compensation for the complainant as well as a direction to the union to apply to have the arbitration award judicially reviewed. For their part, counsel for the Hospital and the representative of the union both relied on the arbitration award as establishing that the petition had nothing to do with the complainant's dismissal, that the Hospital discharged him for other reasons completely, and that these other reasons constituted just cause for discharge. On the basis of this reasoning they contended that the complainant suffered no ill effects from any breach of section 60 by the union prior to his discharge and accordingly he was not entitled to the benefit of any remedial action.

30. In matters such as this, it is a board of arbitration which is assigned the task of determining whether or not just cause existed for an employer to discharge an employee. Absent any element of deceit, bad faith or arbitrariness on the part of the union in presenting a discharged employee's case before a board of arbitration, it is not for this Board in the guise of formulating a remedy to a section 60 violation to overturn the findings of a board of arbitration on the question of whether or not the employer had just cause for discharging an employee. This, however, does not fully answer the question of whether the complainant suffered any ill effects from the breach of section 60. The chairman of the arbitration board concluded that the complainant's discharge was "primarily related" to matters other than the petition and that these other matters constituted just cause for discharge. The question remains, however, as to whether the petition is what caused the Hospital to even consider discharging the complainant and whether absent the petition the Hospital would have put its mind to the question of whether any grounds existed which might justify his discharge.

31. In seeking to determine the answer to this question a number of factors stand out. In favour of the possibility that the Hospital might have considered terminating the complainant on May 1, 1978, even if there had been no petition, is the fact that on April 25, 1978 a donor unit of blood which the complainant had cross-matched was discovered not to be as full as a normal unit. On the other hand, however, no evidence was led before the Board, and there is nothing in the arbitration award to indicate, that prior to the circulation of the petition on April 28th management of the Hospital even considered discharging the complainant. Management apparently acted only after it had received the petition. In addition to this, in support of its action in discharging the complainant the Hospital relied upon a number of incidents going back to January 16, 1977. However, at the time that these incidents actually occurred the Hospital did not use them as a basis for imposing any formal discipline on the complainant. Finally, there is the timing of the complainant's discharge. The petition indicated that if the complainant was not dismissed prior to 4.00 p.m. on May 2, 1978 there would be an unlawful work stoppage. Because of his hours of work and his days off, the only time that the complainant could have been confronted with any charges of alleged misconduct and been dismissed prior to the deadline was on May 1st which is when he was, in fact, called into a meeting with management and dismissed. In taking all of these considerations into account, the Board is led to the conclusion that it was likely the threat of an unlawful work stoppage contained in the petition which caused the Hospital to consider discharging the complainant and in this regard to review his work record to see if any grounds existed which might justify such a move. The Board is satisfied that absent the petition the Hospital would not have discharged the complainant on May 1, 1978.

32. The Board is also satisfied that the reason the Hospital considered discharging the complainant can be traced back to the breach of section 60 by Mr. Hren and Mr. Badawoy. Mr. Hren, the complainant's steward, was the one who called and conducted the meeting on April 27, 1978. It was also Mr. Hren who proposed the circulation of a petition with respect to the "suspect." Absent Mr. Hren's involvement, it appears that there likely would not have been any petition at all. Mr. Badawoy's action in signing the petition when he was president of the local could have only added weight to the threat contained in the petition that an unlawful work stoppage would occur if the complainant were not discharged.

33. It is possible that absent the petition and related breach of section 60 the Hospital would never have put its mind to a possible discharge of the complainant. On the other hand, it is also possible that even without the petition the Hospital might at some point in time subsequent to May 1, 1978 have addressed itself to the complainant's continued suitability as an employee. The problem in seeking to frame a remedy for the breach of section 60 lies in trying to assess the degree of responsibility which should be placed on the union for the situation which the complainant now finds himself in. The Board proposes to use the date of the award of the chairman of the board of arbitration as a cut-off date for assessing any liability against the union. As of this date there existed a determination by a neutral person that just cause did exist for the Hospital to discharge the complainant.

34. To compensate the complainant for the union's breach of section 60, the Board directs Local 576, Ontario Public Service Employees Union, to pay to the complainant an amount equivalent to what he would have earned, had he not been discharged, between the date of his discharge and the issuance of the initial decision of the chairman of the board of arbitration. In that the union's decision not to seek judicial review of the arbitration award did not involve a breach of section 60, the Board declines to direct the union to now file an application for judicial review. However, keeping in mind the compensation award in favor of the complainant, it is possible that the complainant and the union may be able to agree on a formula which will allow the complainant to realize his goal of having the arbitration award taken up on judicial review, while at the same time meeting the union's concerns about an award of costs being made against it should an application for judicial review prove to be unsuccessful.

1309-79-JD Toronto Star Newspapers Limited, Complainant, v. Graphic Arts International Union, No. 35, G.A.I.U. and Printing and Graphic Communications Union No. N-1, Respondents.

Jurisdictional dispute – Work jurisdiction of two agreements overlapping – Nature of work performed important criteria in determining assignment – Relevant criteria in industrial jurisdictional dispute considered.

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members J.A. Ronson and W.F. Rutherford.

APPEARANCES: Derek L. Rogers, James Nicol, C.J. Davies, P. Dawson and Jack Seymour

for the applicant; H. Caley for the respondent Graphic Arts International Union; A. Ryder for the respondent Printing and Graphic Communications Union.

DECISION OF THE BOARD; April 15, 1980.

1. This is an application filed by the applicant employer under section 81(18) of the Act. The application pertains to the assignment of work in connection with the production of photomechanical press plates at the Toronto Star. The applicant company is party to collective agreements with both the Graphic Arts International Union, No. 35, G.A.I.U. (hereinafter referred to as the photoengravers) and the Printing and Graphic Communications Union No. N-1 (hereinafter referred to as the stereotypers). These agreements contain conflicting provisions as to the jurisdiction of the respective unions to a portion of the work referred to above. This application was filed on October 9, 1979. At the time the application was filed the company planned to assign all work in connection with the production of photomechanical plates to the stereotypers in December, 1979 and did in fact make the assignment as planned. The applicant company seeks to have the Board exercise its discretion under section 81(18) of the Act to resolve the conflict in the two aforementioned agreements and specifically asks the Board to alter the provisions of the photoengravers' collective agreement to remove its claim to that part of the work to which it is given jurisdiction in its collective agreement. Section 81(18) of the Act provides:

“Where an employer is a party to or is bound by two or more collective agreements and it appears that the description of the bargaining unit in one of such agreements conflicts with the description of the bargaining unit in the other or another of such agreements, the Board may, upon the application of the employer or any of the trade unions concerned, alter the description of the bargaining units in any such agreement as it considers proper, and the agreement or agreements shall be deemed to have been altered accordingly.”

The photoengravers, in response to the company's application, seek to have the Board award all of the work in connection with the production of photomechanical plates to its members.

2. The jurisdictional dispute which is before us has its roots in the rapid technological advances which have altered the method of producing a major newspaper in the last ten years. As late as 1974 the Toronto Star was produced by a “hot metal” process. News and editorial type, made from molten metal, photographs photomechanically imposed on a metal sheet, and illustrations cast into lead reproductions were arranged on a portable table in the form of a newspaper page and locked into place. The hot metal typesetting was performed by composing room personnel, the lead reproduced illustrations (comics, advertisements etc.) were prepared by stereotypers and the photographic material was prepared by photoengravers. The metal configuration referred to as a chase, and weighing over 75 pounds, was locked into place by composing room personnel and wheeled to stereotypers located on the same floor. The stereotypers then placed a semi-moist piece of cardboard over the chase and rolled it under a molder. The pressure applied by the molder forced an impression of the page into the moist cardboard capturing the pattern on the page. The matrix or mat was then dropped to a second floor foundry where stereotypers trimmed it, packed the open areas, dried and cylindrically shaped it so that the impression of the page was to the in-

side. Molten lead was then applied under pressure to the inside face of the mat, picking up the fine detail in the same cylindrical shape. The lead reproduction, with the printing surface now elevated and to the outside, was then taken by conveyor and affixed to the presses. Each day six to eight lead press plates of each page of the newspaper would be made in this manner depending on the number of presses running on the particular day.

3. In 1974 the Toronto Star moved to a "cold metal" process. Photographic typesetting machines were installed and the type produced was cut by scissors and pasted on to a cardboard sheet the size of a newspaper page. Where in the past the illustrations had been prepared by the stereotypers in the form of lead reproductions, both the illustrations and the photographic material were now prepared by photoengravers using photomechanical equipment for inclusion in the paste-up. There was no dispute at the time with respect to the jurisdiction of the photoengravers to perform this work. The full page paste-up was sent from the composing room to the photoengraving department where a metal photoengraving of the full page was made. The metal photoengraving was then returned to the composing room and forwarded to the stereotypers located on the same floor. It was placed on a metal base, the semi-moist cardboard was placed on top of it and pressure applied by the molder. The resulting mat was no different than the one produced under the "hot metal" process and the drying, shaping and casting of the lead reproduction were performed by stereotypers as they had been under the "hot metal" process. Until 1977, therefore, the change in the process from "hot metal" to "cold metal" was confined to the production of the form from which the stereotypers took the image of a full page. The image was produced in large part by photoengravers using photomechanical means. Stereotypers were no longer required to produce the illustrations as they had in the past. However, their traditional molding and casting functions were carried on as they had been under the "hot metal" process.

4. In 1977 the Toronto Star moved from a metal photoengraving to a plastic photoengraving of the full page paste-up. Under this system the photoengraver, using a newspaper camera, takes a photograph of the full page paste-up and places the negative over a specially treated plastic plate with a thin metal backing. The evidence establishes that the newspaper camera is a relatively simple piece of photographic equipment to operate. The negative is then exposed to ultra violet light thereby causing the specially treated plastic to become fixed and harden where the print and photos appear on the negative. The negative is then removed and the plastic sheet is placed in a "Napp processor" which applies a caustic solution to wash away or etch the areas of the plastic plate not hardened by the exposure. The result is a plastic plate with the print raised or elevated. The "Napp processor" is an automated piece of equipment which does not require technical skills to operate. The plate is then forwarded to the stereotypers who produce a mat and repeat the shaping and casting functions which have been described. Again this innovation did not disturb the traditional job functions of the stereotypers carried on in connection with the production of lead-casted press plates. Under this system, however, the plate produced by the photoengravers from which the lead duplicates are made is plastic rather than metal.

5. In December of 1979 the technology took another major step forward as the company moved to a direct plate system. The presses were modified to accept the thin plastic plate produced by photomechanical means and as a result the casting work traditionally performed by the stereotypers in the production of a duplicate plate was eliminated. The plastic plate produced using the technology and processes described above can now be applied directly to the presses. With the exception of crimping the metal backing to the plastic plate no

further work is required to prepare the plate for attachment to the presses. The molding, drying, shaping and casting operations previously performed in the making of a lead reproduction of the plastic pattern plate have been eliminated.

6. In a memo dated December 7, 1979, the Toronto Star announced its decision with respect to the assignment of work between the stereotypers and the photoengravers under the Direct plastic Plate System. The memo, over the signature of Mr. J. Seymour, the production manager of the company, reads:

“This will confirm The Star’s decision that when we convert to direct printing we will assign direct platemaking work in the following manner: –

1. All full page paste-ups for direct printing – black or colour – which can be processed through the Newspaper camera as a straight line shot will be handled by Stereo staff.
2. All other full page paste-ups for direct printing which require additional work such as screens, surprints, stripping, etc., will be processed through Engraving to obtain a final page negative, then forwarded to Stero for plate processing.

Because of conflicting language in the Engravers and Sterotypers contracts, The Star has asked the Ontario Labour Relations Board to make a determination with respect to these matters.

Hearings have been scheduled for December 20th and 21st at which time the interested parties will make representations in front of the Board. The above work assignment procedures will, however, be followed unless changed by order of the Ontario Labour Relations Board.”

Under the company’s work assignment the photoengravers will continue to perform all of the pre paste-up photographic functions in connection with illustrations and photographs. However, the photoengravers will no longer be responsible for the operation of the newspaper camera and the taking of the negative of the full page paste-up, the exposure of the negative on the plastic plate and the etching of the plastic plate through the Napp processor. Under the company’s work assignment these functions, formerly performed by the photoengravers, are assigned to the stereotypers. The newspaper camera has been moved from the photoengravers’ work area to the work area formerly used by the stereotypers to produce the cardboard mold of the pattern plate. The exposure tower and the Napp processor have been moved from the photoengravers’ work area on the fifth floor to what was formerly the stereotypers foundry on the second floor.

7. Mr. Seymour gave evidence in support of the company’s work assignment. In his view the stereotypers are more closely linked to the printing operation and have historically satisfied the requirements of the company in respect of the quality and quantity of press plates required on a daily basis. Although the stereotypers had never operated photomechanical equipment prior to December, 1979, they have been trained by the company and

are now operating the equipment used in the direct plate process to the satisfaction of the company. Mr. Seymour referred to certain restrictions in the photoengravers' collective agreement (Sunday work, night shift, working rules, lunch periods) as mitigating against assigning the work to the photoengravers. The work assignment was a major issue in the last round of negotiations, however, and the company did not raise its concerns in respect of these matters at the bargaining table. In any event, Mr. Seymour referred in cross-examination to the Sunday premium concern as a "throw-in" and testified that the lunch hour difficulty could be worked out. In the event the Board considered splitting the assignment and leaving the photoengravers with the operation of the newspaper camera and the production of the negative, Mr. Seymour expressed his concern at the additional step which would be created (i.e. composing room to photoengravers to stereotypers rather than directly from composing room to stereotypers). He referred to the additional clerical tasks necessary to log the flow of work and the requirement to assign responsibility between departments in the event of an error. The evidence establishes, however, that the negative is presently logged between the stereotypers on the fifth floor and those on the second. It was established that the backup camera to the newspaper is located in the photoengraving department on the fifth floor.

8. Prior to the introduction of the direct plate process there were 36 stereotypers and 24 photoengravers employed at the Toronto Star. The introduction of the direct plate system will result in a loss of 20 jobs at the Star. If the stereotypers are assigned the entire process their numbers will shrink from 36 to 20 while the number of photoengravers will shrink from 24 to 20. If the process is assigned in its entirety to the photoengravers, however, the number of stereotypers will be reduced from 36 to zero while the number of photoengravers will increase from 24 to 40. Assignment of the entire process to the photoengravers will eliminate the stereotyping trade at the Toronto Star and will result in a substantial increase in the number of photoengravers. Four employees are required to operate the newspaper camera and produce the negatives of the full page paste-up. If the photoengravers are given just this work their numbers will remain the same while the number of stereotypers will decrease by an additional 4 to a total of 16. The stereotypers union also represents pressmen and mail room employees at the Toronto Star, totalling some 250 employees.

9. The parties to this matter put their collective mind to the question of work assignment in connection with the direct plate process in the negotiation of the respective January 1, 1977 - December 31, 1978 collective agreements. The photoengravers' collective agreement, which expired on December 31, 1978, contains a supplemental agreement re Napp direct plastic pattern plate and Napp direct plastic printing plate which provides in part:

"With respect to Napp direct plastic printing plates (or other direct plastic printing plates processed and used in a like manner) letterpress photoengraving work shall consist of making negatives and any stripping of the negatives which may be required in the processing of such printing plates but shall not include printing frame exposure of negatives to plate, washout or development and the preparation of such plate for attachment to the press."

Similarly the stereotypers' collective agreement for the same period contains a supplemental agreement under the same heading which provides in part:

“When Napp direct plastic printing plates (or other direct plastic printing plates processed and used in a like manner) are to be used as press plates, Sterotyping work shall consist of processing such plates from printing frame exposure of negatives to plates, washout or development, and the preparation of such plates for attachment to the press, but shall not include the making or stripping of negatives.”

These agreements represent a tripartite agreement between all three parties as to the assignment of work under the direct plate system. The photoengravers were to retain the use of the newspaper camera and the production of the negative of the full page but agreed to relinquish claim to the printing of the negatives on the plate and the wash-out or etching functions. It is established that the parties knew when they negotiated these agreements that the direct plate system would not be introduced during the term of the agreement expiring December 31, 1978. However, Mr. Seymour answered in the affirmative when asked in cross-examination if the parties could see the Star going to direct at the time these agreements were entered into, and further, answered in the affirmative when asked if they knew it would eliminate the need for a mat and stereo plate and if the concerns raised by this application were threatened at that time.

10. In the negotiation of the renewal to the agreement which expired on December 31, 1978 the Star sought a complete discretion in respect of the assignment of work under the direct plate process. The photoengravers responded by filing an application under section 81 of the Act. In a decision dated March 27, 1979 (*Graphic Arts International Union, Local 35-P and Toronto Star Newspapers Limited, Printing and Graphic Communications Union No. N-1* Board File 1881-78-JD) the Board dismissed the application as premature. The photoengravers also filed a complaint under section 79 of the Act alleging in essence an unlawful interference with its bargaining rights. The Board (see *Toronto Star Newspapers Ltd.*, [1979] OLRB Rep. May 451) refused to equate bargaining rights and work jurisdiction in a craft setting and concluded that in its view “this complaint is nothing more than a latent jurisdictional dispute.” The Board concluded its reasons as follows:

“Our conclusion that this matter has not yet ripened into a jurisdictional dispute, however, does not mean that the Star and Local 1 may use the negotiation process to weaken Local 35-P’s claim to the work in question. Local 35-P is entitled under section 81 of the Act to have its claim to the work in question dealt with on its merits. Accordingly, any attempt to circumvent the jurisdictional dispute procedures of the Act by either the Star or Local 1 in their bargaining would be inconsistent with the Act, and would amount to a breach of the duty to bargain in good faith. The facts before us, however, do not establish that either of the respondents is attempting to circumvent the jurisdictional dispute procedures under the Act. The Star is merely attempting to bargain for a discretion to assign the work in question, and Local 1 is merely asserting its own claim to such work. Even if the Star were to be successful in establishing a discretion to assign the work, and Local 1 were to continue to maintain its claim to the work, these eventualities would not affect the merits of Local 35-P’s case under section 81 if a jurisdictional dispute were to materialize.”

11. The Photoengravers filed a further complaint on May 18, 1979 alleging that “the Star and the stereotypers have made an agreement which encroaches upon the established bargaining rights of the photoengravers by extending recognition to the stereotypers over employees who, until this time, have been represented by the photoengravers.” In addition the complaint alleges that “the Star and the stereotypers have used the negotiating process to circumvent the jurisdictional dispute procedures of the Act.” The Star and the stereotypers entered into an agreement (January 1, 1979 – December 31, 1981) wherein it is provided that the stereotypers’ work shall consist of the making of the full page negative from the full page paste-up in addition to the other work assigned to it under the previous agreement. The Star in turn tabled proposals with the photoengravers which, if accepted, would have effectively extinguished their claim to the making of the full page negative. In its decision (*Graphic Arts International Union, Local 35-P and Toronto Star Newspaper Limited, Printing and Graphic Communications Union No. N-1*, [1979]OLRB Rep. Aug. 811) the Board commented on the tripartite nature of jurisdictional disputes and the process established under the Act to deal with them and concluded that while the parties are encouraged to seek voluntary agreements “any attempt to use economic sanctions or the immediate threat of same to force a settlement or to compromise the position of another in respect of a work assignment dispute which may become the subject matter of a section 81 complaint is contrary to the scheme of the Act and is, therefore, in violation of section 14 of the Act” and found that the refusal of the Star to withdraw its demand without prejudice to whatever position it might take in a subsequent section 81 complaint constituted a violation of section 14 of the Act. Following release of the Board’s decision the Star and the photoengravers returned to the bargaining table and concluded a collective agreement which did not alter the work assignments arising out of the implementation of the direct plate process as contained in their previous agreement. The current photoengravers’ agreement, therefore, is in conflict with the current stereotypers’ agreement in respect of work jurisdiction under the direct plate system.

12. The Board heard evidence of industry practice in respect of the assignment of work under the direct plate process. The assignment of work at the Globe and Mail is identical to that which has been made by the Star. The evidence establishes, however, that the assignment was brought about as the result of contract negotiations in 1978. Mr. Joseph Hann, a Vice-President of the stereotypers’ union with personal knowledge of the operation at the Globe and Mail, admitted in cross-examination that it was generally thought that the photoengravers would get the work prior to the 1978 negotiations at the Globe but that during those negotiations the assignment was turned around. When asked if part of the bargaining consideration which led to the turn around was the fact that the stereotypers also represented pressmen and paper handlers, he replied that it could have had a bearing. The photoengravers refused to sign a collective agreement with the Globe and Mail and no longer have a collective bargaining relationship with the Globe and Mail. The stereotypers also have jurisdiction over the entire process at the Hamilton Spectator, The Ottawa Journal and The Ottawa Citizen. The process is split between the I.T.U. and the stereotypers at the St. Catharines Standard, the Brantford Expositor, The Niagara Falls’ paper and The Kingston-Whig Standard. The I.T.U. has responsibility over the camera and the stereotypers responsibility over plate-making in these establishments. The stereotypers are restricted to the plate-making at the Sudbury Star as well.

13. In addition to the Windsor Star and Inland Publishing the photoengravers enjoy sole jurisdiction over the disputed work at the L’Soleil paper in Quebec City, La Presse in

Montreal and in the Pacific Press papers in British Columbia. The assignment at La Presse and at Pacific Press were as the result of binding awards arising out of jurisdictional disputes between the stereotypers and photoengravers. In a decision of the Quebec Labour Court sitting in appeal from a decision of a Labour Commissioner (see *Graphic Arts International Union Local 555 (F.T.Q. – C.T.C. – C.T.M. vs. La Presse Limitee and Montreal Sterotypers' & Electrotypers' Union, Local 33 and The Newspaper Pressmen's Union of Montreal, Local 41*, No. 500-28-00197-772), the processes which have been described in this decision are reviewed at page 9 of the Judgment. The Labour Court states:

“... the modified operations in question relate implicitly to that phase of the said process consisting in the sum of operations accomplished during the photoengraving process. Whether one considers the placing in contact of a negative with a photosensitive enamel, the operation of exposure to ultraviolet light, or finally, the process of development, one is dealing with operations implicitly similar to those normally performed by photoengravers, within the meaning set forth in the Applicant's accreditation certificate. It is the photoengraving process which is affected by this technological advance. The tools with which the work of photoengraving is accomplished are cameras, the optical and chemical effects of light, the properties of photosensitive enamels etc. These tools remain the same in the di-litho process, even though it is highly automated. The only thing that is changed is the type of plate upon which these tools are used. The photomechanical operation continues to exist.”

The Court went on to state that none of the operations traditionally assigned to stereotypers can be recognized in the new process, and found that “the trade of the stereotyper has been rendered obsolescent by technological process.” The Court rejected the argument advanced by the stereotypers (which has also been made in this case) that it should look to the finished product (i.e. the press plate). The Court reasoned that it must look to the process utilized in making the product and determine whether “the work concerned constitutes photoengraving independent of whether this work yields a finished product and independent of the particular use the employer may make of the finished product.” The Court overturned the ruling of the Labour Commissioner and awarded the work to the photoengravers. The company in that case, as in this, had given the work to the stereotypers.

14. In re *Pacific Press*, a decision of the British Columbia Labour Relations Board dated May 26, 1977, Professor Weiler, in awarding work jurisdiction over the entire direct plastic plate process to the photoengravers, reviewed the technological developments described in this decision and concluded that “the function of the stereotypers is wholly eliminated,” because “... the new operation of making a direct press plate will be largely undistinguishable from the current operation of making a pattern plate.” Professor Weiler rejected the argument of the stereotypers (the same argument as has been put to us) that the direct plastic plate is the press plate traditionally produced by the stereotypers. He concluded that the primary criterion in analyzing the issue of jurisdiction is “the nature of the work done by the employees not the use made by the employer of the product.” While acknowledging its relevance, he rejected the stereotypers' argument with respect to job impact and upheld the employer's assignment of the entire process to the photoengravers.

15. The company argues that its assignment of the platemaking to the stereotypers should be upheld by the Board because the photoengravers have never produced a plate for the presses and are not geared to the production demands of making press plates. The company asks the Board to consider this fact, which supports the employer's preference, along with the stereotypers' collective agreement which gives it jurisdiction over the work, the absence of jurisdiction over plate-making in the photoengravers' agreement, the area practice which shows the stereotypers with the full process at the Globe and Mail and at least the plate-making at a number of other papers within the Province, and the devastating impact upon the stertype craft if the plate-making was awarded to the photoengravers. The company argues that a consideration of these factors should cause the Board to award work jurisdiction over the plate-making to the stereotypers. In reference to the production of the negative, the company relies on the simplicity of the newspaper camera, which stereotypers have been operating to its satisfaction, the lineal work flow which would result if the stereotypers had jurisdiction over the newspaper camera, the area practice, the further loss of stereotypers' jobs if the camera work is assigned to the photoengravers, and the employer's preference in support of its decision to assign the production of the negative to the stereotypers.

16. The stereotypers ask the Board to maintain its existing function; that is to produce plates for the presses. The stereotypers argue that the newspaper camera has taken the place of the molder and the exposure tower and Napp processer have taken the place of the casting equipment but that the function remains the same. Just as typesetters moved from hot metal to photomechanical equipment to perform their function at the Star, the stereotypers ask to be permitted to do the same. The stereotypers also rely on area practice, the devastating impact of an assignment to the photoengravers upon the stertype craft at the Star and the employer's preference in support of its claim to jurisdiction over the direct plate process. The stereotypers rely on the absence of a claim to the plate-making part of the process in the photoengravers' agreement as further support to its claim to at least the plate-making. The stereotypers argue that the 1977 agreement was entered into at a time when it was recognized by all parties that the direct plate system would not be introduced during its term and accordingly, asks the Board to discount the importance of that agreement which is no longer binding.

17. The photoengravers take the position that the party which seeks to upset a prior agreement (i.e. the 1977-78 agreement between the parties) must adduce compelling evidence that it should be changed. The photoengravers maintain that the employer has failed to demonstrate the economies or efficiencies which would result from an assignment of all the work in dispute to the stereotypers. In the absence of any attempt by the company to raise its concerns at the bargaining table with respect to the terms of the photoengravers' agreement which might make it uneconomical or inefficient to assign the work to the photoengravers, they ask us to disregard the company's submissions in this regard. The photoengravers point out that the "lineal flow" of work desired by the company could also be attained by assigning the entire process to the photoengravers and rely on the production capabilities of photoengravers as evidenced by the assignment of the entire process to the photoengravers at a number of major papers across Canada (L'Soleil, La Presse, Windsor Star, Pacific Press). The photoengravers argue that the Board must look to the function or process and not to the end product as argued by the stereotypers. In support we are referred to the award of Professor Weiler in re *Pacific Press*, *supra*, and the Quebec Labour Court decision in *La Presse supra*. The photoengravers also rely on these decisions in support of its contention that where the two unions have competed for the work the practice has been to award it

to the photoengravers. The photoengravers maintain that because the process is a photomechanical one involving the use of cameras and photosensitive materials it falls within the historical work jurisdiction and craft training of the photoengraver. The necessity to train the stereotypers in the operation of the simple newspaper camera illustrates this point in the view of the photoengravers. The photoengravers, relying on the fact that they have performed the work in dispute for the past 3 years (the production of photomechanical plates) and the fact that the historical work functions of the stereotypers have been rendered obsolete, argue that the Board should maintain the photoengravers' assignment to the work. At the very least, the photoengravers lay claim to the operation of the newspaper camera and the production of the full page negative. In support of its claim to at least this portion of the work, the photoengravers rely on the 1977 agreement between the parties and the evidence which established a split jurisdiction in a substantial number of newspapers in Ontario.

18. In assessing the merits of jurisdictional disputes in the construction industry, the Board has looked to 1) collective bargaining relationships, 2) skill and training, 3) consideration of economics and efficiency, 4) the employer's practice and 5) area practice. (See *Anchor Shoring Limited* [1974] OLRB Rep. Aug. 528, *Urban Consolidated Construction Corporation Ltd.* [1977] OLRB Rep. Feb. 41). In *Kingston-Whig Standard Company Limited* [1972] OLRB Rep. Nov. 959 the Board was asked to rule on a jurisdictional dispute between the photoengravers and the I.T.U. The paper had moved from a "hot metal" to a "cold metal" process and the dispute was in respect of the plate-making function. There were no stereotypers at the paper. In that case the Board considered 1) area and industry practice, 2) job loss, 3) collective agreements, 4) availability of craftsmen and skills, 5) awards, 6) employer preference. While each case must be decided on its own merits the factors referred to above and those used by the Board in construction industry disputes are useful guidelines to be used in assessing the merits of any jurisdictional dispute.

19. We accept the conclusion reached in both *Pacific Press, supra*, and *La Presse, supra*, that the Board must look to the nature of the work done by the employees and not the use made by the employer of the end product of the work in dispute. If the end product was to be cast as a primary criterion the result would be to downgrade the importance of skills and ability, and efficiency, as primary criteria. Clearly the skills associated with performing a work process and the efficiency with which it is performed are inter-related factors. A craft union is one whose members "are distinguishable from the other employees and commonly bargain separately and apart from other employees through a trade union that according to established trade union practice pertains to such skills or craft." When called upon to resolve competing work claims between craft unions the Board must look to the work and determine if the skills of one of the crafts are more closely related to the nature of the work in dispute and whether or not the use of these skills by persons trained in the craft will have a bearing on efficiency and economy. If we were to restrict ourselves to the end product these considerations, which must be central to the resolution of any jurisdictional dispute, would become irrelevant.

20. In this case the company will be producing press plates by photomechanical means without the casting of a duplicate lead plate. The plastic pattern plate, which has been produced without objection by the photoengravers since 1977, will become the press plate. The work performed by the photoengravers since 1977 remains virtually unchanged while the work performed by the stereotypers in the casting of a lead plate has been done away with. The entire process is now a photomechanical one. The photoengravers are

trained and skilled in the operation of cameras and in the use of photosensitive materials. The stereotypers, on the other hand, had never operated a camera prior to the instant work assignment and other than for the training given them prior to assuming responsibility for the newspaper camera had not been trained in the use of cameras or photosensitive materials. Although the newspaper camera is a relatively simple piece of equipment, and although the Napp processor is automated, the process with which we are concerned falls within the traditional craft function of the photoengravers. The process draws on the skills of persons trained in the use of cameras and photomechanical equipment. A consideration of the nature of the process and the skills involved, however rudimentary, weigh in favour of awarding the entire process to the photoengravers.

21. In this case, however, the Board has before it collective agreements which provide the stereotypers with an exclusive claim to the plate-making function. The photoengravers' collective agreement provides jurisdiction over the use of the newspaper camera and the production of the full page negative but does not extend jurisdiction to the exposure of the negative on the plate and the etching through the Napp processor or any of the other plate-making functions. The current collective agreements, therefore, suggest a split jurisdiction. This is the same result as reached between the parties in 1977; that is, that the work in dispute should be split between the two unions. The evidence establishes that when this agreement was reached the parties were aware that the direct plate system would be implemented at the Star, albeit at some future date, and that the impact would be as it has been described to the Board. We reject the submission of the stereotypers that this agreement should be disregarded. It is an agreement between all three parties reached at a time when the impact of the process was known but had not been felt. It was negotiated prior to the emotional impact of a work assignment being made to one union or the other but in the knowledge of its effect upon overall employment levels and accordingly, it is a persuasive factor.

22. The Board considered the impact of technological change on the number of jobs affected within each of the competing crafts in the *Kingston-Whig Standard* case, *supra*. In the *Pacific Press* award, *supra*, Professor Weiler saw job loss as a relevant factor. He commented at page 13 of his award that "a union facing technological change should be able to expect that a "med-arb" system such as this one will make an effort to preserve the viability and the integrity of all the units affected by the change in production, to the extent that this is reasonably feasible." In our view the 1977 agreement between the parties, wherein the photoengravers relinquished a substantial portion of their previous work jurisdiction, reflects the concern of all parties with respect to job loss. The plate-making functions which go to the stereotypers under that agreement maintain the stereotypers as a 16 member craft within the Star. If the photoengravers had not agreed to relinquish the plate-making and the assignment had been made to them the stereotypers would have disappeared from the Star. On the basis of the 1977 agreement the photoengravers would have continued as a 20 member craft when the direct plate process was introduced and the stereotypers as a 16 member craft.

23. We are not inclined to be guided by the assignment of work at the *Globe and Mail*. The practice in the industry generally is more compelling than the practice which exists at a single newspaper, albeit one within the immediate area. The stereotypers and the photoengravers each have exclusive jurisdiction over the entire process at a number of major newspapers. While the process has not been split between these two unions in Ontario, it is significant that the I.T.U. is responsible for the operation of the camera and the production of

the negative and the stereotypers are responsible for the production of the plate from the negative in a number of Ontario papers. This is the same division arrived at by the parties in their voluntary agreement and, in our view, the industry practice supports such a division of the work.

24. The employer's preference in this case is that the entire process be assigned to the stereotypers. While employer preference is a factor to be taken into account, the weight to be given it is directly related to the persuasiveness of the employer's submissions with respect to the adverse impact of a contrary assignment upon his business. This is especially so where the employer is attempting to upset a voluntary agreement between all of the parties to the dispute. While we are prepared to give some weight to the company's submissions with respect to the ability of stereotypers to maintain the production schedules required of those producing press plates, we are not persuaded to support its preference with respect to the production of the negative. Regardless of whether the stereotypers or the photoengravers operate the newspaper camera on the 5th floor, the pages must be logged through the area. The employer never raised its concerns with respect to the photoengravers' collective agreement at the bargaining table and indeed, acknowledged that these matters could be worked out. When reference is had to the skills of photoengravers in operating cameras, the placement of the backup camera in the photoengravers' department, the increased flexibility which would result if 4 additional photoengravers were assigned to operate the newspaper camera on the 5th floor, and the agreement signed in 1977 giving this work to photoengravers, the employer's current assignment is difficult to comprehend. In our view, the 1977 voluntary agreement best reflects considerations of economy and efficiency.

25. If the parties had not put their minds to the division of work under the direct plate system and come to an agreement, this Board may nevertheless have been persuaded to split the assignment. Consideration of the impact on jobs, the industry practice, economies and efficiency, the automated nature of the Napp processors and the current collective agreements may have caused the Board to assign the operation of the camera and the production of the negative to the photoengravers and the plate-making to the stereotypers. The parties, however, did put their minds to the issue and agreed that the work should be divided between the two unions in the manner described. The agreement was reached at a time when the impact of the process was known but not yet felt. The agreement is persuasive and when reference is had to all of the other evidence before us it is compelling.

26. Accordingly, pursuant to our authority under section 81 of the Act, we hereby direct that:

- (1) With respect to Napp direct plastic printing plates (or other direct plastic printing plates processed and used in a like manner) letterpress photoengraving work shall consist of making negatives and any stripping of the negative which may be required in the processing of such printing plates but shall not include printing frame exposure of negatives to plate, washout or development and the preparation of such plate for attachment to the press.
- (2) When Napp direct plastic printing plates (or other direct plastic printing plates processed and used in a like manner) are to be used as press plates, Sterotyping work shall consist of processing such

plates from printing frame exposure of negatives to plates, wash-out or development, and the preparation of such plates for attachment to the press, but shall not include the making or stripping of negatives,

and further that the stereotypers' collective agreement be amended to incorporate this direction.

0945-79-U United Electrical, Radio & Machine Workers of America and its Local 504, Complainant, v. **Westinghouse Canada Limited**, Respondent.

Charges – Damages – Duty to Bargain in Good Faith – Lock-Out – Company deciding to move operations from Hamilton – Establishing economic justification for move – Some evidence of anti-union motive – Whether tainting company's conduct – Whether duty to disclose plans for move to Union during bargaining – Extent and nature of duty of employer to bargain over plant relocation reviewed

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members J.A. Ronson and W.F. Rutherford.

APPEARANCES: *L.C. Arnold, John Ball and John Black for the complainant; John C. Murray, Douglas K. Gray and E.A. Taylor for the respondent.*

DECISION OF KEVIN M. BURKETT, ALTERNATE CHAIRMAN; April 28, 1980

1. This is a complaint filed under section 79 of *The Labour Relations Act* alleging violations of sections 3, 14, 42, 56, 58(a), (b) and (c), 61, 63, 66 and 67 of the Act. The complaint arises out of the decision taken by the company to relocate its Switchgear and Control Division presently located in Hamilton, to a number of locations outside Hamilton. There are presently some 600 employees of the company working in the Switchgear and Control Division in Hamilton who will be affected by the decision to relocate. The complainant union represents approximately 1,200 employees of the respondent company at its plants in Hamilton.

2. The complainant alleges that the relocation is motivated by an anti-union animus and further, that it is the intent of the company to seek to preclude employees from joining a trade union of their choice at the new locations. The complainant also alleges that the intended closure of the Switchgear and Control facilities is an unlawful lockout in violation of the Act and that the purpose behind the company's planned transfer of operations, and its refusal to offer continued employment at the new Alliston Plant, constitutes an attempt to preclude or "chill" unionization at the new decentralized plant sites in violation of the Act. Finally, the union alleges that the failure of the company to inform the union of its plan to decentralize and relocate its operations during the course of bargaining constitutes a failure to bargain in good faith.

PART A – THE EVIDENCE

I The Nature of the Company's Business

3. Westinghouse Canada Limited (WCL) operates twelve divisions in Canada. The Switchgear and Control Division (S & C), Turbine and Generating Division, Motor Division and Power Transformer Division are located at two manufacturing sites in Hamilton. For all intents and purposes Westinghouse Canada Limited (WCL) is a wholly owned subsidiary of Westinghouse Electric Corporation (WEC) of Pittsburg, Pennsylvania. The Switchgear and Control Division of Westinghouse Canada produces the counterpart of eight American divisions from the company's Aberdeen Ave. plant in Hamilton and in addition, operates district plants in Calgary and Vancouver. One-third of the Switchgear and Control Aberdeen Avenue facilities are leased from the Canadian Appliance Manufacturing Co. (CAMCO) which bought the Westinghouse Appliance business, including the physical plant, in 1976. The lease expires in 1982 and does not contain an automatic renewal clause. The division produces three broad categories of products: *devices* such as meters, relays, low voltage circuit breakers, and package control devices which are separate and distinct from one another and from the other products in the division; *standard sub assemblies* which are common components made for a number of end products; and *custom assemblies* which are assembled components including devices and standard sub assemblies in the form of finished products to the exact specification of the customer. The district plants in Vancouver and Calgary perform essentially a custom assembly service for their respective local markets.

4. The company engages in an annual strategic planning exercise which is designed to focus the objectives and direction of each of the 16 divisions for a five year period. The strategic planning for 1978-1983 commenced in January, 1978 with the preparation of a draft plan for each division for the relevant period. Mr. Cecil MacNeil, a vice-president of Westinghouse Canada with operating responsibility over the Switchgear and Control Division, submitted a Division Planning summary on January 17, 1978. The summary does not point to any major change in direction or emphasis and refers specifically to the upgrading of the Aberdeen Avenue plant as a programme requiring the support of division funds and staff expertise.

5. In March 1978 a strategic planning workshop was convened at which senior management was addressed by Mr. Frank Tyaack. Mr. Tyaack had served the American parent in a number of capacities before joining Westinghouse Canada on January 1, 1978 as Executive Vice-President and Chief Operating Officer. He was appointed President of the Canadian Company effective October 1, 1978. He emphasized the need to carefully select the specific market within which the various divisions of the company could most effectively compete (so as to "take your risks in smaller chunks") and the need for sound portfolio analysis upon which to decide in advance the criteria for major investments. He advised his managers that central to the strategy of WCL should be the growth of business ventures which are sensibly based in Canada, but can serve competitively to a substantial degree markets outside of Canada. He informed the company's senior managers that the company required "... a balanced portfolio, which identifies those divisions which would be making such a thrust; and those divisions which would be keeping us prosperous enough to do it." Mr. Tyaack emphasized by means of a grid that tariff sensitivity and technological dependency were to be the overriding variables in determining which segments of the business would expand into world markets and which segments would be operated domestically to generate cash flow. It was made clear that segments of the business which were tariff sensitive (i.e.

could not compete outside Canada and could not exist in Canada without tariff protection) would receive no major investments and would be operated so as to maximize cash flow in the short term. At the other end of the spectrum segments of the business which were capable of serving more than the Canadian market and were technologically independent from the American parent would receive a heavy or disproportionate share of strategic resource allocation and would be operated on a growth as distinct from a cash emphasis basis. Mr. Tyaack explained that tariffs have been falling in recent years and pointed to the most recent round of GATT negotiations in support of the need to plan on the basis of a zero tariff assumption.

6. Mr. MacNeil interpreted Mr. Tyaack's remarks as writing off Westinghouse's existing branch plant strategy and establishing two predominant investment criteria; tariff sensitivity and technological dependency. In his mind there were only one or two switchgear and control products in the area of the grid attracting heavy investment. In particular, the devices segment of the business stood to become a cash generator with little or no investment potential because it operated behind high tariff walls and was dependent upon American technology.

7. Mr. Tyaack testified that he had done a rough financial analysis of the Switchgear and Control Division in early 1978. He testified that he had based his analysis on data from 1977 which had been a relatively good year for the Division. Three handwritten sheets containing his analysis were placed in evidence. He determined that the value added by the division to its finished products was low in relation to the comparable American divisions and concluded on the basis of the value added figures that the division was primarily an assembly operation. He determined as well that not only was the amount of value added too low but that the cost of adding value was too high. His analysis showed a 20% productivity lag between the Switchgear and Control Division and comparable operating divisions in the United States which caused him to conclude that the "factory economics" were not competitive. He testified that when he visited the Switchgear and Control plant on Aberdeen Road in Hamilton he thought that "it must have looked like a switchgear plant would have looked like in the 1930's." He did not decide then and there, however, that the Division had to be relocated and indeed, his June 15th letter to Mr. MacNeil (which is reproduced in part in paragraph 9 below) relegates devices to a stand pat position. The decision to move was made at a later date.

8. He advised the Board that from his experience in the United States he had concluded that economies of scale don't work in a business where there are so many different products. He is of the view that in a business such as Switchgear and Control's a large factory results in slower reaction time, impaired customer relations and the alienation of the worker as the job becomes more formal and repetitive with a resulting loss of productivity. Mr. Tyaack testified that the company's average after tax margin on sales from 1950-1978 and its average return on investment during this period had been 5-6% which he equated to a savings bank rate of return. It is his evidence that the dissatisfaction of the owners of the business with the company's financial performance resulted in the mandate given to him to review the Canadian operations. The evidence establishes that Westinghouse Canada Limited had a 13% return on investment in 1977 and that the Switchgear and Control Division had a 12% return on investment in 1977 and the second highest sales of any division in the company.

9. Mr. Tyaack was involved in a strategic planning workshop for the Switchgear and Control Division which was held on June 14, 1978. In a letter to Mr. MacNeil dated June 15, 1978 he summarized his thoughts coming out of that session. For purposes of his analysis Mr. Tyaack divided Switchgear and Control's business into devices, assemblies and district plants. In reference to devices Mr. Tyaack commented that in his mind they are tariff sensitive and reminded Mr. MacNeil that in the U.S. device facilities are regarded as fixed and non-expandable. Growth is absorbed off-shore in either Puerto Rico or Ireland. In respect of devices he concluded by advising Mr. MacNeil that

"Extrapolating to a zero-tariff condition, I would think the pressure would be very great to send devices directly from Puerto Rico and Ireland into the Canadian market, in which case WCL needs only WESCO to facilitate this, and would not need S&C. For S&C self-manufacture of devices to be a better alternative, its IBT margins would have to be at least double those of the off-shore facilities, since the latter pay no taxes.

...

For these reasons, I'd be guarded against any heavy commitments in devices, and would place these lines in the Tariff-Sensitive part of the portfolio. And that implies a heavy emphasis on short-run profitability, positive cash generation, and fast-pay-back projects of modest dimensions."

Mr. Tyaack commented that he viewed district plants as a line of commerce unto itself, a potentially large one with profit potential "in the Canadian market, non-tariff sensitive, part of our portfolio, deserving of strong strategic attention." He concluded that "it may be preferable to view it as S & C's main business with all other activities designed to support it." Mr. Tyaack recommended that all assembly work gravitate into the scattered network of district plants and that all customized assemblies be done by every plant for its market area. In a paragraph dealing with "centralized mother facilities" Mr. Tyaack stated that "if the business is to be flexible in make/buy joining decisions it may need a place to make devices." Mr. Tyaack concluded as follows:

"Strictly speaking this line of reasoning, which is perhaps too skeletal at this stage, constitutes only a strategic option, which I believe we should evaluate. Concurrent pressures, however, due to the strike, could well compress our evaluation and decision time to shorter than we'd like."

Mr. MacNeil testified that his division read the President's remarks as a directive to develop a strategic plan which had as its thrust decentralized manufacture in Canada as an alternative to going out of business.

II *The Decision to Relocate*

10. The Switchgear and Control Division responded with a 1978-83 strategic plan dated July 21, 1978. The challenge facing the division is described as the transformation from consolidated plant facilities to a "new phase of development dedicated to improve customer service through multi-plant locations, destributed network computer services, and centralized facilities interfacing with technology and supply." The plan states that:

“S & C Division Strategic Concept 1978-83

The development of our Division's strategic concept for the next five years responds to these significant environmental factors:

1. Tariff sensitivity – assuming a trend towards free trade.
2. Technological dependence on W.E.C.
3. Vulnerability of centralized operation.
4. Need for improved customer service in open, shallow, project rich, resource based market.”

The reference to vulnerability of centralized operation is in respect of potential strike activity at the centralized Hamilton facility. The plan put forward by the Division divides its business into 1) multi plant operation, which encompasses all custom assemblies and standard sub assemblies and 2) centralized facilities which encompasses facilitative services (marketing, engineering, quality assurance, material flow, and business and technical systems) data processing, feeders (machine shop, steel fabrication, copper ship, plating line, paint line) and devices. The major strategic thrusts were set down on July 21, 1978 as:

“Major Strategic Thrusts

1. Decentralization of all production facilities while using central base for facilitative services including main frame computer.
2. Obvious demarcation line segregating custom assemblies for plant control and standard sub assemblies for centralized control using computers, and strong standard development programs.
3. Participative management program transfer to multi plant operation with non-union operation as objective for all new plants.
4. Close customer tie-in with custom assembly design and manufacture.
5. Plant involvement in identifying, co-ordinating, and implementing new product opportunities.”

The strategic plan was reviewed and the Division was given authority in July to proceed with an appropriation request for the funds necessary to implement the strategic plan put forward on July 21, 1978.

11. The evidence of Mr. MacNeil, who was responsible for drawing up the strategic plan and the request for appropriation, is that the devices portion of the business was especially sensitive to a zero tariff situation. It is his evidence that the continued existence of the devices segment of the business depended on productivity improvement. He testified that the division proposed planning its case for productivity from an ability to start from “square one” without the inheritance of job classifications or work standards. He was asked in cross-examination if wages and seniority restrictions upon the division were also considered and

responded that "that would probably be right – they were not factors in our initial discussions – initially work schedules and job classifications." He replied in the affirmative when asked if all of the factors in a union contract were considered and if it was essential to start without the inheritance of a union collective agreement. He went on to testify that "our concern was to sell the notion as to improved productivity – first question you would be asked would be how do you propose to do it in a union atmosphere – the answer, in a management controlled plant without a union."

12. An appropriation request document dated October 27, 1978 was placed in evidence. The environmental factors, including "vulnerability of centralized operation" to which the plan responds are set out on page 4 of the document. The implications of a refusal to appropriate the funds necessary to implement the strategic plan are listed as follows:

"Minimum investment recognizes the following factors as influence on sales, cost and profit.

Present lease of 113,000 ft² of space from Camco expires on June 29, 1981, we have no guarantee of renewal. Services such as water, steam, compressed air, electrical power and sewers are shared and minimum investment will constraint our output.

Labour relations continue to deteriorate in this location with 107,750 man days lost since 1972, also substantial loss of sales and profit in 1978 due to the recent strike situation.

Competitor strategy has seen some relocation of these operations into market locations.

Direct product cost will tend to increase as a result of the labour situation and minimum investment.

On the basis of minimum investment at this location, sales reflect price realization only after 1980, no growth."

13. The major strategic objectives are described as:

"Major Strategic Objectives

1. Customer Service and Improved Market Penetration

Close customer tie-in with custom assembly design and manufacture, through decentralization of facilities supported by a central services group and corporate main frame computer.

2. Management Controlled Plants

Participative management program transfer to multi-plant operation with non-union operation as objective for all new plants.

3. New Product Opportunities

Entrepreneurial involvement in identifying, co-ordinating and implementing new product local market opportunities as opposed to central product market planning.

4. Product Design Control

Demarcation line segregating custom assemblies, controlled locally by local management; standard sub-assemblies, controlled centrally using computers, and standard development programs.”

14. The strategic considerations underlying the request for funds are set out on pages 11-15 of the appropriation document as follows:

“Strategic Considerations

Business Needs

The business needs of market strength, cost minimization, reduced tariff vulnerability and control can all be accomplished by a combination of:

Providing a close interface with, and responsiveness to local market and customers.

Emphasis on product standardization at the subassembly level.

Centralized plant control of all but the final custom assembly plants.

Our district plants in Vancouver and Calgary focus on these but are limited in scope and coverage. For equivalent products, the 1977 Vancouver and Calgary penetrations are 26% and 34% – VS – Hamilton Centralized Plant at 24%.

Profitability

Short turn around time, product flexibility up to shipping date, local identity, and customer service will all contribute to price realization as reflected in current operations. For example, an order for 2501 in MCC'S was placed by Dow Chemical at Ratios 10% more attractive than market levels in September with Calgary District Plant.

Competitive Edge

Manual system flexibility on custom assemblies with distributed process data availability will emphasize the edge district plants now give us, e.g. orders taken from I-T-E and Square D amounting to \$100M in 1977.

Cost Improvement

Current physical and personal restrictions impede progress of cost improvement programs. Manufacturing processes, layouts, and productivity im-

provements with long range paybacks will be an inherent part of the new strategy.

Distributed Processing

Development of distributed processing in the computer industry, and the coincidence of this with a corporate requirement for expanded computer capacity makes remote manufacturing and custom assembly marketing practical.

Pull Thru

Additional Wesco sales of \$4M average per year will drive from an expanded and country-wide district plant type operation.

Competitive Strategies

Several competitors operate facilities similar to our main plant – district plant approach including Square D and Klockner-Moeller. Allen-Brady and C.G.E. build on strong distributor representation. But the most successful Canadian electrical manufacturer is Federal Pioneer whose distributed plant philosophy is stated in their 1976 Annual Report.

'From its earliest days, your Corporation determined that its success would be furthered by having manufacturing plants strategically located from coast to coast in Canada. As a result of this decision, factories are now operating in all of the principal marketing areas of the country. Ours is one of the few manufacturers serving the electrical industry with so broad a base of operation and this fact has enabled it to excel in serving the particular needs of each region. This is particularly important in Canada where requirements can differ from region to region, permitting a local facility to meet better the needs of the local market.'

1972-1977	F.P.L.	W.C.L.
Rate of Growth, Sales compounded annually	15.2%	8.9%
Rate of Profitability (I.A.T. % of Sales)	7.1%	3.7%

Market Penetration

Changes in market centres within the country as well as mix changes can be managed and reacted to quickly. To this end our major competitor (Federal Pioneer Limited) has 13 dispersed plants in Canada. Federal's Sales, 1972-1977, have grown, 35% faster than Switchgear and Control's Sales.

Current Plant

- Old – 91% over 33 years
- Multi-Storey – 50% above or below ground floor

- Multi-Building – 7 separate buildings originally built for other unrelated functions.
- Partially Leased – 113K's of 338K Ft² leased from Camco.
- Services Integrated – Continuation of basic facility services an on-going responsibility to Camco.

Labour Management Relations

Increasing tendency to work stoppages evident with Hamilton U.E. – Total man days lost 107,750 since 1972.

Aftermath of a 4 month strike provides a major rebuilding assignment to get productivity back to pre-strike level let alone gain the necessary improvement.

Non Tariff Barriers

While most of our devices are tariff sensitive the existence of such non tariff barriers as provincial utility purchasing practices, franchization, metrickation, Canadian Standards Z299.1 approval, Government inspection and control of Calibration facilities, warrant special concern for maintaining current market performance, e.g. no Watthour meters are sold in Canada that are not assembled and tested in Canadian manufacturing facility.

Canadian Dollar Devaluation

The current state of the Canadian Dollar emphasizes the need for continuing facilities to provide a make-buy capability in serving the Canadian market."

15. The existing plant facilities are accurately described in the document in the following terms:

"Switchgear and Control Division Plant

S & C occupies 338,722 sq. ft. of space in 7 buildings, including 112,739 sq. ft. leased from Camco. Westinghouse may terminate the lease with 60 days notice.

- 50% is on the ground floor

– 50% is on 18 other different levels

– 15% accessible by ramps

– 32% accessible by elevator

– 3% only accessible by stairs

Six of the buildings are joined to form an elongated U shape with a railway trestle separating the legs of the U. The West side of the U is leased from Camco, with truck docks located at the extreme top end of the leg of the U. The East side of the U contains railway dock and steel dock located towards the top end of this leg of the U. Road access to these points is narrow and restricted and crosses Camco owned property.

Street access to the bottom end of the U is now suitable only for pedestrians. No shipping or receiving facilities exist at this end.

The remaining building is separate and is accessible by a 3 foot pedestrian walkway and a Camco owned roadway.

Of the building areas occupied –

– 13% is 64 years old

– 79% is between 64 and 39 years old

– 91% is in excess of 33 years old

Heating is expensive since only one building (6% of the total area) is insulated and there are large areas of steel sash in all but one building.

Column spacing in most multi-storey areas is 20' x 20' with some areas having 8' x 23' spacing.

Services such as water, steam, compressed air, electrical power, and sewers are shared with Camco. Major replacement programs are required with most of the cost Westinghouse responsibility."

Mr. Tom Davidson, the union officer who gave evidence, rated the quality of the Aberdeen Avenue facilities as 3 or 4 on a scale to 10 when asked to do so in cross-examination. When asked in cross-examination if the facility was adequate, Mr. MacNeil referred to the need to improve productivity and testified that given the new strategy the Aberdeen Ave. facilities were no longer viable. When pressed further, however, he admitted that the facilities were adequate. Mr. MacNeil was of the view that the lease with CAMCO could have been renewed.

16. The document makes reference to the labour relations framework which exists at the Aberdeen Ave. facility in the following terms:

“Union Relations

There are currently (Hamilton) three union contracts in Switchgear and Control Division. One covers 28 draftsmen, another, 60 office clerical staff and the third covers all hourly employees. Each of these contracts takes in all manufacturing divisions in Hamilton. The contracts all permit inter-division bumping with one seniority clause.

While many programs have been instituted to improve communications and increase worker commitment, they have been limited by the constraints of a city-wide contract and the accompanying employee peer pressure.

Since 1967 Switchgear and Control Division has lost 131,400 man days of production because of labour disputes. 107,750 of those lost man days have occurred since 1972.

Personnel Relations

It is the intention of S & C Management to manage the decentralized plants in a manner that will dispel the need for third party representation by employees.

To that end, much attention has been given to site selection criteria. Similar care is being taken in the selection of the management personnel who will staff these plants.

Personnel policies, programs and handbooks are being developed which reflect management's commitment to good Labour-Management relations. Job descriptions will allow a flexibility that will result in more effective utilization of the work force and increased employee job satisfaction.

Personnel relations will be the responsibility of local plant management. A central divisional consulting service will provide guidance in the administration of company policy, advice on training and development and assistance with any aspect of personnel relations when requested.”

17. The site selection criteria which are referred to in the description of the intended personnel policies are described at page 34 of the appropriation request.

“Site Selection Criteria

(Except for Custom Assemblies)

Musts

1. Plant population no greater than 2% of community population or greater than 10% of labour pool. Labour area not to exceed 30 miles – MG-S20.
2. Not more than 50% of manufacturing population unionized.
3. More than 40 miles from Hamilton, London, Port Hope – MG-S20.

4. No unionized electrical membership in the manufacturing community.
5. Not within 20 miles of 2, 4.

Site Selection Criteria
(Custom Assemblies Plants)

Musts

1. Thirty minutes from majority of buying influences/sales offices.
2. Plant population no greater than 2% of community population or greater than 10% of labour pool. Labour pool not to exceed 30 miles – MG-S20.
3. More than one custom carrier.”

These are the only selection criteria shown in the appropriation document. It is most important for our purposes to recognize the distinction between the criteria which apply to the custom assembly plants and those which apply except for custom assemblies which would include device manufacturing facilities and standard sub assembly facilities.

18. The Switchgear and Control Division went forward to the Westinghouse Electric Co. Major Projects Review Committee (Pittsburg) on November 15, 1978 with a request for funds in excess of \$11 million, including building rental, for implementation of the strategic plan described herein. The projected return on investment was calculated to be 18% excluding terminal value or 24.5% including terminal value. Approval was forthcoming from the Westinghouse Electric Company Board of Directors on November 29, 1978 and from the Westinghouse Canada Limited Board of Directors on December 12, 1978. Mr. McNeil acknowledged in examination-in-chief that prior to obtaining approval the Division proceeded as if approval would be forthcoming. In total 600 jobs will be moved from Hamilton over the three year phase-in period which is scheduled to begin with the opening of a meter plant (devices) in Alliston in January, 1980 and a second device plant in Perth, Ontario in mid-1980. Mr. Tyaack testified that he has set an objective of no lay-offs in Hamilton other than for those hired subsequent to January 1, 1979 on a temporary basis. Mr. MacNeil testified that a sister division has committed to continue to employ those who might otherwise be affected by the moves to Alliston and Perth until the summer of 1980.

19. The “Appropriation Description” attached to the Appropriation Request documents states that approximately 30 management and salaried employees will be relocated to the new plants but that “all others will be hired locally” and that “employees who remain in Hamilton will exercise their rights under the terms of their union contracts and bump into other Hamilton divisions or be laid off.” Mr. MacNeil maintained in his evidence that this did not mean that the company would not hire any of its existing employees at the new locations. In a memo to Mr. MacNeil over the signature of Mr. E.A. Taylor, Vice-President – Personnel, dated August 9, 1979, eleven days before the filing of this complaint and well after the union had reacted angrily to the proposed relocation, Mr. Taylor advised that “our policy is that present employees in Switchgear and Control Division who make application

for employment at Alliston will have their application carefully reviewed and full consideration will be given to employing them on jobs for which they have demonstrated satisfactory work experience with us,” Mr. MacNeil testified that he does not foresee a great deal of difference in job descriptions between the old plant and the new plants. There is no evidence before the Board that any Switchgear and Control Division employee who may be affected by the relocation has made application and has been refused employment at any of the new locations.

20. Both Mr. Tyaack and Mr. MacNeil acknowledged that the employees at the new plant will have the ultimate right to select a bargaining agent and denied that the company has any intention to interfere with employee rights under the Act. Mr. Tyaack explained that the company intends to maximize productivity by dedicating itself to a better quality of working life. Mr. Tyaack testified that having made the decision to move, the company wanted to lower the odds on interference so as to have the best shot at quality of working life initiatives. He testified that the presence of collective bargaining is not a problem but that the risk of the adversary relationship carrying on between negotiations is. He testified that he cannot stand the adversary relationship blocking opportunities to work together and therefore, the preferable outcome for the company is not to be unionized at the new locations. He supports the objective of a “non-union operation” for the new plants as a desired end but emphasized that the company intends to achieve this objective by means of improving the quality of working life and not by unlawful interference with employee rights to self determination.

III History of Plant Relocation and Recent Negotiations

21. The evidence establishes that from the mid 1950's to the present the company has moved or sold a number of its operations. Most recently the company sold its appliance business to CAMCO. Discussions were carried on in advance by the company and union and the employees affected were given the opportunity to exercise seniority and remain with Westinghouse or go with CAMCO. In the past the company has extended voluntary recognition to the trade union following plant moves on at least two occasions but has refused to do so when it moved part of its operation to London in 1957 and relocated the electronics division to Burlington in 1971. In 1961 the union attempted to negotiate a recognition clause covering the then existing Hamilton operations wherever they might be located. The union was unsuccessful. In response to the move of the Electronics Division to Burlington in 1971 the union demanded in the 1972 negotiations that if plants 1-2-3 moved during the term of the agreement the agreement would continue to cover the employees at the new location. The union was unsuccessful. The evidence establishes that the recognition clause in the present collective agreement between the parties has been in its present form since 1959; that is, it has defined the scope of the union's recognition in terms of the street address of the company's Hamilton based operations.

22. Although the Switchgear and Control Division continued in Hamilton throughout the period when other segments of the company's business were being relocated, the managers of Switchgear and Control considered the option of relocation in the early 1970's and in 1972 recommended that the division be moved from its existing location. A decision was taken at that time to relocate and a \$12 million appropriation of company funds was approved to effect the decision. Twenty six acres were purchased in Burlington adjacent to the

Electronics Division facilities and an announcement of the intention to relocate to Burlington was made in 1975. The advantages given by the company at the time included modern, single storey, energy efficient premises and a unified and united work force. Mr. MacNeil gave evidence that economies of scale would have been an advantage of a move to Burlington as well. Before any action was taken to implement the move to Burlington the company's appliance division was sold causing the company to alter its immediate plans for the relocation of the Switchgear and Control Division. The company continues to own the 26 acres of land adjacent to its Electronic Division plant in Burlington and the property stood vacant at the time the company purchased land in Alliston, Perth and Mount Forest for the decentralization of Switchgear and Control which is the subject matter of this complaint. The company purchased 7 acres in Alliston, 18 acres in Mount Forest and 10-12 acres in Perth. When asked in cross-examination if the Switchgear and Control relocation could have been accommodated at the Burlington site, Mr. MacNeil replied that it could have been. Mr. MacNeil replied in the negative when asked in cross-examination if there were reasons other than those set out in the site selection criteria for not choosing Burlington as an appropriate location for a device manufacturing facility. Mr. Tyaack testified there would be no diseconomies of scale to be gained and, therefore, a move to Burlington would "recreate the problem." He testified further that once the site selection criteria had been established Burlington "flunked". The United Electrical Workers represent the employees of the company at the Burlington Electronics Division.

23. The negotiations between the parties for the present collective agreement which expires April 22, 1981, commenced in February of 1978. A legal strike commenced on May 10, 1978 and continued until September 13, 1978. The memorandum of settlement entered into on September 13, 1978 was ratified on September 15, 1978 and the formal collective agreement was executed between the parties on December 11, 1978, the same day that the Westinghouse Canada Limited's Board of Directors approved the funds necessary to institute the decentralization of the Switchgear and Control Division. The evidence establishes that at no time during the negotiations did the union ask the company if it was planning to reorganize or relocate any parts of its business. Indeed, the union proposed no amendment to article 3.01 of the old agreement giving the company the right to determine the number and location of its plants. The evidence also establishes that at no time during the negotiations did the company advise the union that it was planning to decentralize and relocate its Switchgear and Control Division outside of Hamilton. Mr. Tyaack testified that during the period of negotiations the move to decentralize could best be described as an "unevaluated likelihood". Mr. T. Davidson, the union's National Co-ordinator with responsibility for the Westinghouse chain testified that although the union began to hear rumours in January, 1979 it was not made aware of the company's plans until March 9, 1979.

PART B - THE ARGUMENT

The Company's Position

24. The company asks the Board to decide on the evidence that the decision to relocate was an economic decision which was made after September 15, 1978 without any anti-union animus and that the consideration of union factors pertained only to site selection and not to the decision to relocate. The company relies firstly upon the evidence relating to the condition of the Aberdeen Avenue premises occupied by Switchgear and Control and the evidence which establishes that in 1972 the company decided to move from these premises

and subsequently purchased land in Burlington for the purpose of relocating. The company relies secondly upon the investment criteria laid down by Mr. Tyaack which it maintains are devoid of anti-union motive. The company argues that the application of these criteria caused the decision to be made. The company relies thirdly upon Mr. Tyaack's pre-commitment to quality of working life concepts, his thinking with respect to economies of scale and his analyses of Switchgear and Control's factory economics as supportive of the conclusion that the decision to relocate was motivated by economic factors and not by an anti-union animus. The company relies fourthly upon the absence of any reference to the trade union in both the working papers containing Mr. Tyaack's financial analysis of the Switchgear and Control Division and Mr. Tyaack's letter to Mr. McNeil of June 15, 1978 setting out his views on the future direction of the division. The company emphasized that any consideration of the union factors flowed from but were not part of the economic decision to go. The company argues that once having decided to relocate for economic reasons it was free to go wherever it pleased and to use whatever selection criteria it pleased so long as it did not interfere with the right of employees at the new location to choose a bargaining agent.

25. The company argues in the alternative that even if the Board does not accept that economic reasons are the only reasons for the relocation it must find that the "preponderant motive" for relocation was economic and that it is therefore not in violation of the Act. The company relies on section 68 of the Act in support of its position that an employer's awareness of the effect of a business decision upon rights under the Act does not make the implementation of that decision unlawful if it is predominantly an economic decision. Section 68 of the Act provides:

"Nothing in this Act prohibits any suspension or discontinuance for cause of an employer's operations or the quitting of employment for cause if the suspension, discontinuance or quitting does not constitute a lock-out or strike."

The company referred the Board to a number of American cases and in particular the *NLRB v. Rapid Bindery Corp.* case, (1961) 293 F. 2d 170, wherein it argues both the National Labour Relations Board and the courts have accepted the underlying business reason as the test to be applied in plant relocation cases notwithstanding a substantial degree of anti-union animus. The company maintains that in view of the provisions of section 68 of the Act, this Board must apply the same test and argued that the Board has been applying this test. The company relies on *Webster & Horsfall (Canada) Ltd.*, [1969] OLRB Rep. Sept. 789; *Humpty Dumpty*, [1977] OLRB Rep. July 401; *Inglis Ltd.* [1977] OLRB Rep. Mar. 128; and *Academy of Medicine*, [1977] OLRB Rep. Dec. 783 in support of its contention that a company is permitted to take the impact of its economic decisions into account so long as anti-union considerations are not the predominant motive. The company maintains that the effect of these decisions regardless of how they impact upon rights under the Act, do not create violations of the Act.

26. In response to the allegation that it has violated the duty to bargain in good faith the company takes the position that its bargaining conduct must be measured against the history of closure and relocation of plants covered by collective agreements with the union, the proposals tabled by the union in this round of bargaining and the date of the decision to relocate. The company maintains that the decision to relocate was not finalized until the necessary funds had been approved by the Canadian Board of Directors on December 12, 1978. The company argues that the Chief Executive Officer had no authority to proceed with the

plan prior to the approval of the Board of Directors and in these circumstances and in the absence of any evidence to suggest that the timing of board approval was manipulated, there can be no obligation upon the company to reveal its plans to the trade union before they have been put to the Board of Directors. The company asserts that the requirement for full and rational discussion of the bargaining issues would not be served by imposing upon the company an obligation to reveal plans which may never be carried out. Final approval for the relocation was handed down on December 12, 1978, some three months after the completion of bargaining, and accordingly, the company maintains that it cannot be found to have breached the duty to bargain in good faith for failing to engage the union in discussion of these matters. Indeed, the company argues that if it had revealed its plans during the course of the strike, before approval from the Board of Directors, it might have been charged under the Act with threatening the trade union and its members. Even if the decision to relocate had been made during the course of bargaining the company, having regard to the presumed awareness of the union to the history of uncertainty attached to the company's Hamilton operations and to the union's proposal that the clause giving the company the exclusive right to determine the location of its operations be continued, maintains that it would be required to do no more than accept the status quo as proposed by the union. The company acknowledges that if it had been asked during bargaining if it was planning to move any of its operations it may have been under an obligation to apprise the union of its plans. In the face of the history of plant moves and in the absence of any question from the union regarding its intentions, the company maintains that it was under no obligation to raise the matter with the trade union.

27. The company referred the Board to *Livingston Transportation Ltd.*, [1977] OLRB Rep. July 346; *Rondar Services Ltd.*, [1977] OLRB Rep. Oct. 655; *Humpty Dumpty Foods Ltd.* [1977] OLRB Rep. July 401; and *Canada Valve Limited*, [1979] OLRB Rep. Aug. 731, in support of its position that the company's actions do not fall within the terms of the statutory definition of lockout and cannot, therefore, be found to be an unlawful lockout as is alleged by the trade union. In particular, the company maintains that there is no evidence that its actions were designed to compel or induce its employees to do or refrain from doing anything.

II The Union's Position

28. There are four main thrusts to the union's argument in support of its position that the decision to relocate is in violation of the Act. The union contends firstly, that the decision to relocate was conceived on the basis of a predominantly anti-union motive; that is, to rid the division of the trade union recognized as the bargaining agent for its employees. The union contends secondly, that the failure of the company to reveal its plans to relocate during the course of bargaining and prior to the union becoming bound by the no strike provisions of a collective agreement extending to April 30, 1981 constitutes a breach of the duty to bargain in good faith. The union argues thirdly, that movement of bargaining unit jobs outside the scope of the bargaining unit is in violation of the collective agreement and is, therefore, in violation of section 42 of the Act. Finally, the union contends that the decision of the company to relocate falls within the statutory definition of lockout and having regard to the existence of a subsisting collective agreement is unlawful.

29. The union does not dispute the respondent employer's contention that in a case such as this the Board must look to the "predominant motive" in determining whether or

not the decision was taken for motives proscribed by the Act. The union acknowledges that in this case there exists a mix of economic or business related motives and anti-union motive. The union contends, however, that on the evidence, the Board must find that the predominant motive underlying the decision of Switchgear and Control to relocate its business was its desire to rid itself of the trade union. The union relies on evidence which it maintains establishes that the division had enjoyed a 12% return on investment in 1977 and, therefore, was not faced with immediate and pressing financial problems as would cause it to relocate. The union asks the Board to find that whereas there are sound business reasons for locating the custom assembly part of the business within the market to be serviced, no such marketing rationale exists in respect of the devices part of the business. The union maintains that whatever economic concerns generated the decision to relocate the devices part of the business from Hamilton, these concerns could have been addressed by moving to Burlington where the company already owned sufficient land to accommodate the device manufacturing operations to be performed at Alliston, Perth and Mount Forest. The union asks the Board to find on the basis of the site selection criteria which caused the company to forego Burlington and relocate the devices business elsewhere, that the company's primary motive in relocating was to rid itself of the trade union. The union maintains that it is illegal to move an operation covered by a collective agreement to a location selected solely on the basis of anti-union factors.

30. The union argues that the strategic plan of the Switchgear and Control Division which called for the decentralization of its operations was in tangible form and had received the approval of Mr. Tyaack, the Chief Operating Officer of the Canadian Company, during the course of bargaining and that the site selection criteria were formulated during bargaining. The union argues that where, as here, a company's plan or decision would drastically affect the course of bargaining there is an obligation upon the company to advise the union, as the legal bargaining agent of the employees affected. The union reasons that meaningful discussions and bargaining must be allowed to take place during the open period and against the backdrop of possible economic sanctions. The union argues that in this case the company had a tangible and concrete plan, the effect of which would be to render the collective agreement meaningless for approximately ½ the bargaining unit. In the face of a concrete plan which would have a fundamental impact upon the bargaining unit employees the union maintains that the company was required, under section 14 of the Act, to reveal its intentions in order to facilitate a full and open discussion concerning all matters critical to the bargaining relationship. In this regard the union referred the Board to *Canadian Industries Limited*, [1976] OLRB Rep. May 199; *St. Joseph's Hospital*, (1976), 76 CLLC ¶16,026 and the *Inglis Limited* case [1977] OLRB Rep. March 128. In addition the union referred to a number of American cases (*Ozark Trailers*, 63 L.R.R.M. 1264, *McLaughlin Manufacturing*, 74 L.R.R.M. 1756 affd. 80 L.R.R.M. 1756, *Weltronic Company* 73 L.R.R.M. 2014) which it maintains stand for the proposition that an employer must bargain not only about the effects of a decision to relocate but about the decision as well.

31. The union asks the Board to find that the company's decision to relocate constitutes a threatened refusal to continue to employ its members made for the purpose of avoiding union bargaining rights and for the purpose of seeking to compel employees to refrain from exercising rights and privileges under the Act. The union maintains that these motives bring the company's decision within the definition of lockout and asks the Board to so find. The union maintains that the company's decision was motivated by a desire to seek to compel the employees in other than the Switchgear and Control Division to refrain from exercis-

ing rights and privileges under the Act and is, therefore, a threatened lockout characterized as an irrevocable one. In support of this leg of its argument the union referred to *Rondar Services Limited supra*; *Harry Woods Transport Ltd.*, [1976] OLRB Rep. July 341; *Livingston Transportation Ltd.*, *supra*; *Humpty Dumpty*, *supra* and *Ralph Milrod*, [1977] OLRB Rep. Feb. 79.

32. The union relies on the provisions of article 1.01 of the current agreement between the parties to argue that the company is not permitted under the terms of the agreement to remove any jobs from the bargaining unit. Article 1.01 of the agreement provides:

"The Company recognizes that the Union is the Collective Bargaining Agent for all of its employees employed on jobs which are at present hourly rated jobs located at 286 Sanford Avenue, (hereinafter known as 'Sanford Avenue Plant'), 606 Aberdeen Avenue (hereinafter known as 'Aberdeen Avenue Plant'), and 1632 Burlington Street East (hereinafter known as 'Beech Road Plant') of the Company at Hamilton, save and except the office, technical and personnel staff, watchmen, timekeepers, time study personnel, clerical employees and foremen. It is provided in this connection that no job which is presently hourly rated shall be during the term of this Agreement removed from the bargaining unit."

The union maintains that the decision to relocate the Switchgear and Control Division at the cost of 600 bargaining unit jobs is a unilateral attempt by the company to circumvent the terms of a bilateral collective agreement and is, therefore, in violation of section 42 of the Act. The union also relies upon *Dare Foods*, (1969), 20 L.A.C. 166 (Adell) in particular at page 172 of the exception noted at the conclusion of the *Russellsteel* case, (1966), 17 L.A.C. 253 (Arthurs) to argue that during the term of a collective agreement an arbitrator should not allow a decision which subverts the collective agreement to stand unless it is supported by overriding economic justification. The union maintains that just such a fundamental breach of the agreement has occurred in this case and in the absence of overriding economic justification the Board must find decision contrary to the agreement as a whole and a violation of section 42 of the Act. The union maintains that because the breach is so serious and because it is intertwined with the other proceedings before the Board, the Board should not defer to the arbitration process as it sometimes does when faced with a less serious breach of the agreement and an alleged unfair labour practice which can properly be dealt with at arbitration.

III *The Company In Reply*

33. In reply the company reiterated that in its view the Board already applies the predominant motive theory and must do so in light of the provisions of section 68 of the Act which the company argues allows a company to discontinue any of its operations so long as it has economic cause to do so. The company replies to the union's argument that the predominant motive in this case was anti-union by directing the Board to Mr. Tyaack's letter of June 15th to Mr. MacNeil and to his analysis of the factory economies of Switchgear and Control which do not contain a hint of anti-union motive. The company maintains that Mr. Tyaack's instructions to Mr. MacNeil to investigate a strategic option establish the genesis of the decision to relocate and it is at this point that motives must be assessed for purposes of determining whether the subsequent relocation was lawful. The company argues that at the point the

strategic directive was issued, economic considerations were the only motivating factor and that it was only subsequent to undertaking the strategic directive that the company put its mind to where it might relocate along with other matters to be considered if and when it relocated. The company discounts the contention of the union that an inference of anti-union motive must be drawn from the failure of the company to move to Burlington. The company maintains that the union considerations which led to its decision not to move to Burlington were but a single factor of many and that Mr. MacNeil was not asked about these other factors in cross-examination but only about the union criteria. The company takes the position that in any event, having decided to move for economic reasons, it was free to locate wherever it chose; the issue being why it chose to relocate and not where it chose to relocate.

34. The company maintains that the collective agreement is binding and because it contains a grievance and arbitration procedure the Board should not assume jurisdiction to deal with the alleged violation but should defer to the grievance and arbitration provisions. In the alternative the company argues that the clause does not mean what the union says it means and relies upon a 1952 award of Judge Lang (1952), 4 L.A.C. 1536, and a more recent arbitration award of Mr. Weatherill, interpreting essentially the same language, the unsuccessful attempts by the union to achieve in bargaining what it now says article 1.01 provides, and the decrease in the number of Hamilton based jobs over the years which had not brought forth grievances or complaints before the Board. The company asks the Board to find that article 1.01 restricts the assignment of bargaining unit work to supervisors but does not restrict the right of the company to relocate its operations; a right which it maintains is expressly given to the company under article 3.01(b). The company cites the judgment of Chief Justice Laskin in *McGavin Toastmaster Ltd. v. Ainscough et al.*, [1976] 1 S.C.R. 718; 54 D.L.R. (3d) 1, in support of its position that there is no such thing as a fundamental breach of a collective agreement.

PART C – THE DECISION

I The Collective Agreement

35. The union maintains that the company has breached article 1.01 of the subsisting collective agreement between the parties and therefore has contravened section 42 of the Act. Section 42 of the Act provides:

“A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.”

The long-standing practice of this Board has been to defer to the arbitration procedures established under section 37 of the Act to resolve all differences between the parties arising from the interpretation, application, administration and alleged violation of a collective agreement when complaints of this type have been brought under the Act. Where the complaint involves both an alleged breach of an agreement and an alleged unfair labour practice the Board has maintained its practice of deferral where satisfied that the merits of both the alleged collective agreement breach and the alleged unfair labour practice can be dealt with at arbitration. The Board made it clear in *Selinger Wood Ltd.* [1979] OLRB Rep. June 574, however, that where there is an alleged unfair labour practice and related breach of the col-

lective agreement which, if proven, would constitute a defacto repudiation of the trade union the Board will assess the employer's conduct vis-a-vis his obligations under the collective agreement. Where an employer's conduct constitutes a flagrant and massive violation of the agreement, and has the effect of seriously undermining a trade union, the Board may consider the employer's actions as evidence of an anti-union motivation. In assessing the employer's conduct the Board may be required to put its mind to the terms of the collective agreement. We are satisfied in this case that our legislative mandate requires us to determine if the employer's decision constitutes a violation of its collective agreement with the trade union. Our purpose is to determine if there exists a flagrant violation which may provide some evidence of anti-union motive or conversely, if the decision was taken in compliance with the terms of the collective agreement, evidence which may negate the inference of anti-union motive.

36. The last sentence of article 1.01, the language upon which the union relies, has been included in each and every agreement between the parties since the agreement entered into on April 23, 1952. It has been the subject matter of two arbitration awards; the first is found at 4 L.A.C. 1536 (Lang) and the most recent is an unreported award of Mr. Weatherill dated December 14, 1979. Mr. Weatherill cites the earlier award with approval, concluding that:

"The last sentence of article 1.01 has appeared in the collective agreements made between the parties over a number of years, and has been the subject of an arbitration: 4 L.A.C. 1536 (Lang), where it was said that the purpose, and the effect, of that language was to prevent hourly-rated employees from being removed from the bargaining unit by the device of putting them on salary. We think, with respect, that it is a proper interpretation of this language in its context. There is no guarantee that persons will continue to be employed in existing classifications; on the other hand, where a person is employed by the company in 'bargaining unit' work, then that person comes within the bargaining unit. There appears to be no explicit prohibition of 'contracting-out' as such."

We agree with both Mr. Weatherill and Judge Lang in their interpretation of the relevant language and when reference is had to the negotiation history between the parties and the number of occasions upon which the company has moved jobs out of the bargaining unit without challenge of grievance there can be no doubt that article 1.01 does not prohibit the contracting out of work or the relocation of work for genuine business reasons.

37. It is well established in this jurisdiction that absent an express restriction in the collective agreement an employer is not restricted in contracting out or relocating work for genuine business reasons. The leading authority for this proposition is *Russellsteel Ltd.*, (1966), 17 L.A.C. 253 (Arthurs) and while there is some obiter in *Dare Foods Ltd.*, (1969), 20 L.A.C. 166 (Adell) which speaks of implicit restrictions which act to prevent management from undermining the collective agreement, that case was decided on the basis of the reasoning found in the *Russellsteel* case, *supra*. There is no express restrictions on the language of the instant agreement prohibiting the company from relocating its operations for genuine business reasons and having regard to the arbitral authority, we are not prepared to infer an implicit restriction in this regard. The Supreme Court of Canada in *McGavin Toastmaster Ltd. v. Ainscough et al*, [1976] 1 S.C.R. 718; 54 D.L.R. (3d) 1 held that the common

law concepts of repudiation and fundamental breach of contract cannot apply to unexpired collective agreements entered into pursuant to legislation which imposes the duty to bargain collectively. Assuming at this point that the decision to relocate was made for genuine business reasons and not for the purpose of defeating trade union rights, we find, notwithstanding the effect of the company's action, that it was not in violation of the collective agreement. It is important to note at this juncture that Professor Arthurs in the *Russelsteel* case, *supra*, did not foreclose the possibility that "different problems may be presented by contracting out from a desire to destroy the bargaining relationship or from anti-union sentiments." These are issues before us in this matter.

II *The Duty to Bargain*

38. The union charges that the company's failure to advise it during the course of bargaining of its plan to decentralize its Switchgear and Control operation is a breach of the duty to bargain in good faith as imposed upon it under section 14 of the Act. Given the intention to conclude a collective agreement the Board has defined the duty imposed under section 14 as one which protects the integrity of the decision-making process which is intrinsic to collective bargaining. In the *Inglis Limited* case, *supra*, the Board was asked to find that the employer's failure to reveal plans to relocate a part of its business when asked in bargaining constituted a breach of the duty to bargain in good faith. The Board set out a useful summary of its section 14 jurisprudence in cases where union recognition is not an issue at para. 16 of that decision:

"The recent Board decisions dealing with Section 14 violations have stressed the decision-making aspect of collective bargaining and have found actions by one party which undermine the decision-making capability of the other to be conduct in breach of the duty imposed by Section 14 of the Act. Collective bargaining as an exercise which underpins the social and economic structures of our society demands a high level of decision making capability and it follows that conduct which weakens this process must be found to be in violation of the Act. In the *Devilbiss (Canada) Limited* case, [1976] OLRB Rep. March 49 refusal to supply the other side with information necessary to its decision-making capability was found to be contrary to Section 14. In the *Canadian Industries Limited* case, [1976] OLRB Rep. May 199 the unwillingness of one party to engage in a full discussion with the other was likewise found contrary to Section 14. In the *Graphic Centre* case, [1976] OLRB Rep. May 221 the tabling of fresh demands during the concluding state of bargaining was found to undermine the decision-making framework of collective bargaining. (See also the recently released *Board of Health of Haliburton, Kawartha, Pine Ridge Health Unit and H.E. Good* case Board File 1066-76-U, decision dated February 15, 1977.) The Board has not previously dealt with alleged misrepresentation at the bargaining table. It is self-evident however, that misrepresentation, which is the antithesis of good faith, destroys the rational basis upon which informed collective bargaining decisions are made. These decisions which are in respect of compensation, job security and the other terms and conditions of employment must follow from full and honest discussion. Misrepresentation is alien to this process and is contrary to the duty set out in Section 14 of the Act."

The Board satisfied itself in that case that the company had no plans to relocate at the time it bargained the collective agreement and dismissed the section 14 complaint.

39. Collective bargaining during the prescribed "open period" is the preferred vehicle for establishing terms and conditions of employment in this jurisdiction. With the exception of union recognition and inter-union jurisdictional disputes the scope of matters which may be bargained to impasse in this jurisdiction, as contrasted to bargaining under the *National Labour Relations Act*, is virtually unlimited as is seen from the statutory definition of collective agreement. A collective agreement is defined in the Act as an agreement in writing containing provisions respecting terms and conditions of employment or the rights, privileges or duties of the employer, the employers' organization, the trade union or the employees and under section 14 of the Act the parties are required to bargain in good faith and make every reasonable effort to make a collective agreement. Once an agreement is reached, however, the parties are bound to it for its stipulated term and are prohibited from engaging in economic sanctions during its term regardless of changing economic conditions or management initiatives. The restrictions placed upon a trade union in this regard are to be contrasted with the freedom allowed under section 152 of the *Canada Labour Code*, c. L-1 which permits a trade union to bargain to impasse about the effects of technological change occurring during the term of a collective agreement. Having regard to the importance of the exercise, the requirement for full and open discussion, the scope of matters open to bargaining and the statutory framework which binds the parties to the terms of their agreement for its full term, can there be any doubt that the section 14 duty requires an employer to respond honestly when asked in bargaining if he is contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit. Similarly, can there be any doubt that an employer is under a section 14 obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees it represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.

40. The more difficult question is whether there is an obligation on an employer to reveal on his own initiative plans which are not finalized at the time of bargaining but which, if implemented during the term of the collective agreement, would have a significant impact on the economic lives of bargaining unit employees. On one side the Board must be concerned with potential distortion of the bargaining process by the imposition of an obligation which requires the employer to advise the union on his own initiative of plans which may never become decisions. On the other side, however, the Board must be sensitive to the purpose of the collective bargaining process and to the role of the trade union as exclusive bargaining representative of the employees who might be affected if these plans resulted in decisions being made by the company.

41. The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one reason or another, plans are often discarded in the conceptual stage

or are later abandoned because of changing environmental factors. The company's initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in every bargaining situation at what point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decisions, the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrusts the parties into a delicate and often difficult interface. Given the requirement upon the company to respond honestly at the bargaining table to union inquiries with respect to company plans which may have a significant impact on the bargaining unit, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could serve to distort the bargaining process and create the potential for additional litigation between the parties. The section 14 duty, therefore, does not require an employer to reveal on his own initiative plans which have not become at least de facto decisions.

42. The signed memorandum of agreement between the parties dated September 12, 1978 was ratified on September 15th and constituted a collective agreement within the meaning of section 1(1) of the Act as of that date. (See *Graphic Centre* [1976] OLRB Rep. May 221.) The funds necessary to implement the plan to decentralize were not approved until November 15, 1978 at the earliest. The Major Product Review Committee of the parent company gave approval to the \$11 million appropriation on that date. The matter went on to the parent company's Board of Directors about two weeks later. In our view a decision requiring the investment of approximately \$11 million of capital is not a viable decision until those responsible for allocating the necessary funds have considered the arguments for and against and have decided one way or the other. In this case the necessary funds were not approved until the middle of November; some two months following the completion of bargaining. Although the timing is convenient from the company's point of view, there is no evidence to support the conclusion that the company manipulated the timing of its presentation to the parent. Indeed Mr. Tyaack in his letter of June 15, 1979 to Mr. MacNeil speaks of a compressed evaluation and decision time because of the strike. The inference to be drawn is that Mr. MacNeil should proceed with haste. There is no evidence to suggest that the company manipulated an end to the strike so as it could go forward with its plans to decentralize during a period when the union could not bargain in response. No evidence directed at the particular nature of the bargaining moves which led to the September 12th memorandum of settlement was introduced. In the result we have come to the conclusion on the balance of probabilities that the company had not made a hard decision to relocate during the course of bargaining as would have required it to reveal its decision to the trade union.

43. The complainant trade union, which represented the company's Hamilton employees since 1945, has seen the company move parts of its operation from Hamilton on a number of occasions. Indeed, the evidence establishes that the union has responded to the relocation of work by unsuccessfully attempting to negotiate an expanded recognition on two occasions. While the company has negotiated with the union concerning the employee-related effects of some of its relocation decisions in the past, it has not done so on all occa-

sions and this union may be seen to have recognized that future bona fide dislocations were a distinct possibility and that if they occurred the employees would not be protected other than for the exercise of city-wide seniority. The decision announced by the company in 1975 and rescinded shortly thereafter, to move the Switch-gear and Control Division from Aberdeen Avenue to Burlington, underscores the extent to which this union should have been sensitive to the possibility of relocation. The trade union, however, failed to raise the matter and did not propose altering article 3.01(b) of the expired agreement which gives the company the unilateral right to determine the number and location of its plants. In these circumstances the union's position may properly have been seen by the employer as an acknowledgment of the status quo vis-a-vis the employer's right to locate its plants. The company had not reached a decision to relocate during bargaining as would have required it to reveal the content of that decision to the trade union. The union, although aware of the past history of this company with respect to relocations from Hamilton, chose not to inquire of the company whether it was planning any major reorganizations as would have required the company to reveal the extent of its planning. We find, therefore, that the conduct of the company during bargaining did not violate the section 14 duty. The allegations as they relate to a breach of section 14 of the Act are hereby dismissed.

III *Anti Union Motive*

44. We now turn to the unfair labour practice provisions underlying this complaint and to a consideration of the law as it relates to the degree of anti union motive necessary to establish such violations of the Act. For the purpose of our analysis it is useful to distinguish between decisions affecting individual employees and major business decisions having potentially broader impact. In dealing with the treatment of individual employees this Board has consistently held that if only one of the reasons for an employer's actions against an employee (discharge, layoff, transfer, demotion, etc.) is related to union activity the action is in contravention of the Act. Given the reverse legal onus mandated by section 79 (4a) the Board has held that to find there has been no violation of the Act in these kinds of cases it must be satisfied that the employer's actions were not in any way motivated by anti-union sentiment. The Board summarized this approach and the effect of the statutory reversal of the legal burden of proof in *The Barrie Examiner* case, [1975] OLRB Rep. Oct. 745 as follows:

"... the appearance of a legitimate reason for discharge does not exonerate the employer, if it can be established that there also existed an illegitimate reason for the employer's conduct.

This approach effectively prevents an anti-union motive from masquerading as just cause. Given the requirement that there be absolutely no anti-union motive, the effect of the reversal of the onus of proof is to require the employer to establish two fundamental facts – first, that the reasons given for the discharge are the only reasons and, second, that these reasons are not tainted by any anti-union motive. Both elements must be established on the balance of probabilities in order for the employer to establish that no violation of the Act has occurred."

(See also *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 294 and *Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299.) Judicial support for this application of the law

is found in *Regina v. Bushnell Communications et al* (1973), 1 O.R. (2d) 442 wherein the Ontario High Court overturned a lower court decision which had dismissed a complaint under section 110(3) of the *Canada Labour Code*, which is identical in all material respects to section 58 of *The Labour Relations Act*, on the grounds that membership in a union was not established as the “principal reason” for the termination of employment. The High Court held:

“In considering an enactment devoid of the words ‘sole reason’ or ‘for the reason only’ applied to the act of dismissal and resting only on the word ‘because’, the Court must take an expanded view of its application. If the evidence satisfies it beyond a reasonable doubt that membership in a trade union was present to the mind of the employer in his decision to dismiss, either as a main reason or one incidental to it, or as one of many reasons regardless of priority, s. 110(3) of the *Canada Labour Code* has been transgressed.”

The decision of the High Court was upheld on appeal by the Court of Appeal (4 O.R. (2d) 288) and was cited with approval by the Federal Court in *Sheehan and Upper Lakes Shipping Limited et al* (1977), 81 D.L.R. (3d) 208. In this jurisdiction, therefore, the Board, with judicial support, applies a “taint theory” in dealing with alleged unlawful treatment of individual employees. If an employer’s actions impact against individual employees and the motives underlying the employer’s action are in any way tainted by an anti-union animus the employer is in violation of the Act.

45. The respondent company, relying on American authority and a series of Ontario Labour Relations Board cases, takes the position that the “predominant motive” governs when assessing the legality of major business decisions (relocation, sub-contracting, plant closure etc.) under *The Labour Relations Act*. The union does not challenge the appropriateness of such a test in this case but instead submitted that the predominant motive behind the company’s decision to relocate in this case was in fact anti-union on the evidence before the Board. Notwithstanding this apparent concession a review of the authorities does not convince us that the Board has applied the predominant motive test or that such a test is appropriate in deciding if major business decisions are in violation of *The Labour Relations Act*.

46. We begin our reasons for this conclusion by observing that there is a significant area of disagreement between the National Labour Relations Board and some American courts over the degree of anti-union motive necessary to impugn actions of employers under the National Labour Relations Act. In respect of discriminatory discharge cases this friction was referred to in Du Ross, *Toward Rationality in Discriminatory Discharge Cases*, (1977-78) 66 Georgetown Law Journal 1109-1133 in the following terms:

“This Court and the Board are now in broad disagreement over the quantum of employer animus necessary to make out a violation of section 8(a) (3) in discriminatory discharge cases. The First Circuit requires a clear showing that the employer’s dominant or compelling motive for the employee’s discharge was the latter’s pro-union activity. The Board, equally adamant, maintains that any consideration by the decision-maker of pro-union or protected activity is sufficient to establish a violation.”

Thus while some American courts have adopted a test in these matters diametrically opposed to that applied by our courts in the *Bushnell* case, *supra*, the National Labour Relations Board has not.

47. The tension between the National Labour Relations Board and the courts exists in cases dealing with major business decisions as well. This is apparent from a reading of the court's judgment in *NLRB v. Rapid Bindery Corporation* (1961) 293 F. 2d 170; the primary American authority relied upon by the respondent company in this matter. In that case the employer had demonstrated a desire to operate without a union and subsequently made a decision to relocate immediately after a bargaining agent was selected by his employees. The employer engaged in negotiations and finalized a collective agreement without informing the union or negotiating with it in respect of the forthcoming closure and transfer. The employer cited economic reasons for its relocation decision; inadequate plant facilities, incompetent work force, transportation costs and customer demands. The NLRB found, however, that:

"Despite the employer's claim that the move was for economic reasons, the preponderance of credible evidence showed that the decision to move was made after the election, (of the bargaining agent) in an atmosphere antagonistic towards the union, and to discourage membership in it."

On application for enforcement, however, the second circuit Court of Appeals found that the decision to relocate was not a mandatory subject of collective bargaining and accepted the employer's position that the decision to move was justified on solid economic grounds. The court stated in part:

"Though there may have been animosity between the Union and Rapid, animosity furnishes no basis for inference that this was the preponderant motive for the move when convincing evidence was received demonstrating business necessity. The decided cases do not condemn an employer who considers his relationship with his plant's union as only one part of the broad economic picture he must survey when he is faced with determining the desirability of making changes in his operations."

Reference should also be had to *Frito-Lay Inc.*, [1977-78] CCH NLRB ¶18,678, a case in which the NLRB found that but for anti-union motivation the closing of one of the company's plants and the transfer of work out of the bargaining unit would not have occurred. The Board found the company moved its operation because the advent of the union spelled the end of its system of "open management" in the plant and found this to be an anti-union motive. The court found that an anti-union motive was not established on the facts.

48. The deference of the American Courts to the right of employers to manage when these rights are brought into conflict with employee rights to organize and bargain collectively is clearly focused in the Supreme Court decision in *Textile Workers Union of American v. Darlington Manufacturing Company* (1965), 51 LC ¶19,590. In this case a board of directors voted to liquidate a company immediately after the employees selected a bargaining agent. The NLRB held this decision to have been motivated by anti-union animus and ordered back pay for all Darlington employees until they obtained substantially equivalent work or were put on preferential hiring lists at other related plants. However, the Supreme

Court found that under the National Labour Relations Act an employer had the absolute right to terminate his entire business for any reason. The court stated:

“The discriminatory lockout designed to destroy a union, like a ‘runaway shop’, is a lever which has been used to discourage collective employee activities in the future. But a complete liquidation of a business yields no such future benefit for the employer, if the termination is bona fide. It may be motivated more by spite against the union than by business reasons, but it is not the type of discrimination which is prohibited by the Act.”

49. This Board dealt with the decision of an employer to go out of business in *The Academy of Medicine* case, [1977] OLRB Rep. Dec. 783 and, in contrast to the American approach, stated:

“The conclusion that an employer may not, under *The Labour Relations Act*, close down with impunity is hardly a startling one. Ontario legislation in the field of business regulation imposes specific restrictions on the right of business entities to dissolve. These restrictions are based on the premise that a business should not escape liability for obligations incurred before or in the course of dissolution. For a similar reason, *The Labour Relations Act* does not permit an employer to insulate itself from the prohibitions against anti-union conduct by simply discontinuing operations.”

This Board commented that it would be strange indeed if the threat to close operations constituted a clear violation of the Act but the total effectuation of the threat did not. It reasoned that it would be stranger still, if an employer violates the Act by firing some of his employees for the same reason but not by firing all of them. In deciding the *Academy of Medicine* case the Board found that the *Darlington* decision did not commend itself because it was based on a statute, which, in the opinion of the United States Supreme Court, allows an employer to terminate its entire business for whatever reason it pleases.

50. *The Labour Relations Act* is based on the policy of collective representation of employees as the preferred method of regulating employer/employee relations. The Act establishes a legal framework within which employees are free to join together, bargain collectively and take collective economic action at certain prescribed times. The unfair labour practice sections of the Act prohibit a broad range of anti-union conduct and serve to protect employees in the exercise of the basic rights accorded under the statute. This Board, with judicial support, has held that any employer action against an individual employee which is even partly motivated by anti-union sentiment is in violation of the Act, notwithstanding the coexistence of legitimate business purpose. Having regard to the policy underpinnings of the Act and the degree of anti-union motive necessary to cause an unfair labour practice finding in respect of actions taken against an individual employee, it would seem unusual to conclude that a major business decision taken even in part for anti-union reasons, and having a major adverse impact upon the economic lives of a number of employees, is permissible under the Act. This, however is the precise result which flows from the approach urged upon us.

51. Moreover, contrary to the submissions of the company, this Board has not adopted the predominant motive test in its cases dealing with major business decisions. In

the *Academy of Medicine* case, *supra*, the Board found that the respondent's decision to close the Call Answering Service "was motivated in whole or in substantial part by anti-union considerations" and made an unfair labour practice finding. In the *Humpty Dumpty Foods Limited* case [1977] OLRB Rep. July 401, a case dealing with an alleged unlawful lockout, the Board, in finding that the employer's decision to relocate its warehouse outside the scope of the union's recognition constituted an unlawful lockout, found that the employer's action was "motivated by a desire to compel or induce his employees to refrain from exercising rights or privileges under the Act." In the *Humber College of Applied Arts and Technology* case [1979] OLRB Rep. June 520, the Board found that the employer, in subcontracting its security work, did so "to insulate itself from the natural and inevitable consequences of the exercise by the security guards of their right to strike" and made an unfair labour practice finding. In the *Inglis Limited* case, [1977] OLRB Rep. March 128, on the other hand, the Board found that the decision of the company to relocate its parts and service function "was conceived on the basis of changing business conditions" which became known to the company after bargaining and refused to make an unfair labour practice finding. None of these cases, all of which post-date the Court of Appeal's decision in *Bushnell*, *supra*, can be read as standing for the proposition that the Board applies a predominant motive test in considering whether or not major business decisions are in violation of the Act. In the *Inglis* case, *supra*, the Board was satisfied that there was no anti-union motive and in the other three cases the Board was satisfied that an anti-union motive existed, either in whole or in part, and found contraventions of the Act.

52. In *Consolidated Sand and Gravel*, [1978] OLRB Rep. March 264, a case dealing with the decision of a quarry operator to switch from the direct hiring of drivers to a system under which drivers were to be assigned through a broker, the Board was asked to find that the decision to change its method of operation was in violation of the Act. The Board, while acknowledging that the company had been considering moving to a brokerage system for some time applied the taint theory in finding against the company. The Board found that "the action taken at the Pickering pit with respect to the complaints therein was tainted by anti-union motivation and was an attempt to ensure that the respondent would not be required to deal with its employees through a trade union."

53. In *Webster and Horsfall (Canada) Ltd.*, [1969] OLRB Rep. Sept. 780 the Board was faced with an allegation that an employer who went out of business during the course of a strike had violated the Act. The Board stated:

"We are of the opinion that the right to strike is so important and fundamental to the scheme of collective bargaining pronounced by the Labour Relations Act that activities or conduct destructive to that right cannot be justified by reasons either devoid of legitimate business purpose or lacking in significant business purpose."

The Board went on to find that the company's decision to close its operation "resulted from a confluence of economic factors" – including the effects of the strike and concluded that the reason advanced by the company for discharging its employees "was both legitimate and substantial." While the Board used the language of "significant business purposes" in holding there had been no unfair labour practice, the decision must be read in the context of a decision written prior to the statutory reversal of the onus of proof. The Board in that case, faced with the destructive impact of the company's decision, took the position that the onus

was on the company to establish that it had not intended the consequences of its action. The reference to “significant business purposes” was designed to put the company on notice that, failing significant business purpose, the Board would draw the inference of an anti-union motive. However, the Board accepted the business rationale put forward and found that no anti-union motive was established. There is no indication in the decision that it was intended to establish the proposition that so long as a significant business purpose exists a co-existing anti-union motive does not create an unfair labour practice.

54. Section 68 of the Act does not support the adoption of a predominant motive approach to cases involving major business decisions as argued by the company. The unfair labour practice sections of the Act make it unlawful to discriminate against an employee in respect of his employment or opportunity for employment for anti-union reasons. We do not read section 68 as permitting the employer to act even in part on the basis of anti-union motives, which are clearly proscribed by the companion sections of the statute. (See *Academy of Medicine*, [1977] OLRB Rep. Dec 783 at para. 36 and *Webster and Horsfall (Canada) Ltd.*, *supra*, at pages 784 and 785. When reference is had to sections 56, 58 and 61 of the Act, one must conclude that the “cause” referred to in section 68 of the Act is cause which is free from anti-union motive. The purpose of section 68 is to save the employer harmless from the effects of major business decisions which are free of anti-union motive. The section ensures that the mere impact of a bona fide business decision (a decision taken for “cause”) cannot be used to infer an anti-union purpose or to support the foundation of a complaint under any other section of the Act. For example section 56 of the Act can be interpreted as prohibiting any employer action which has the effect of interfering with the representation of employees by a trade union regardless of whether or not an anti-union motive exists.

55. The protection afforded to employers under the section does not apply to lockouts. When reference is had to the statutory definition of lockout and to the scheme of the Act it is conceivable that a lockout may be unlawful, not by reason of anti-union motive, but by reason of the timing of the employer’s action. The prohibition against strikes and lockouts during the term of a collective agreement and during the compulsory freeze period is a cornerstone to the labour relations policy embodied in the Act. If the legislature had not excluded lockouts from the saving provisions of section 68, however, an untimely lockout, which would otherwise be unlawful, might not be in violation of the Act; a result inconsistent with the policy of the Act.

56. Against all of the foregoing we are not inclined to follow the approach of some American courts which have adopted the “predominant motive” approach to cases involving major business decisions which impact upon employee rights. In our opinion this approach would do violence to the protections afforded to employees under our Act and would create an indefensible distinction between anti-union employer decisions which affect one or two employees and those which may affect the whole work force. This Board, with judicial support, has consistently found that management actions which may only be partially motivated by anti-union considerations are in violation of the Act. This test is the proper one to be applied in this case. This is not to say, however, that in shaping a remedy to unfair labour practices created by major business decisions the Board will not take co-existing and bona fide economic factors into account.

57. We must now decide on the facts of this case if the company was in whole or in part motivated by an anti-union animus in deciding to relocate its Switchgear and Control

Division. The company asks us to make our assessment as of June 15, 1978; the date which it maintains the strategic directive to investigate and evaluate the possibility of relocation was handed down. Even if we were to concede that the strategic directive was to investigate the possibility of relocating the devices segment of the business and that genuine business considerations caused it to be issued, it is clear that a strategic directive is qualitatively different than an actual decision. Indeed, the company in defence of its failure to advise the trade union during bargaining of the strategic directive it was investigating, argued that the decision was not made in the sense that the plan could be implemented, until December, 1978. Mr. Tyaack referred to the plan as it was in June as an "unevaluated likelihood". The task before this Board is to assess the motives for the decision, not the "unevaluated likelihood." While the factors which led to the decision to investigate a possible relocation may be relevant, the Board must decide the matter on the basis of the motives which led to the actual decision to relocate.

58. The distinction is an important one in the circumstances of this case. Mr. Tyaack in his letter to Mr. MacNeil of June 15th distinguishes devices from the other two segments of the business and concludes that devices should be looked at as tariff sensitive without any heavy investment commitment and with "a heavy emphasis on short-run profitability, positive cash generation, and fast pay-back projects of modest dimensions." Mr. Tyaack had completed his analysis of the Switchgear and Control factory economics well in advance of June 15th and yet there was no strategic directive at that point to investigate a relocation of the device manufacturing facilities. Devices, in contrast to assemblies and district plants, were seen as a "cash cow." The factors which precipitated the plan to relocate the devices part of the business were formulated between June 15th and July 21st, during the course of a lengthy strike, and find full expression in the October 27th appropriation document.

59. In disposing of the alleged violation of section 14 of the Act the Board came to the conclusion that the de facto decision to relocate was made on or about November 15, 1978 when the Major Products Review Committee of Westinghouse Electric Company received and considered the appropriation request document dated October 27, 1978 and approved the necessary funds. The document contains a detailed rationale for relocating the business and the Board must analyze this rationale in order to determine whether or not the company was governed in whole or in part by an anti-union motive.

60. We are compelled to segment the business as it was segmented by the Switchgear and Control Division for purposes of making its request for funds in order to decentralize. The company's business was divided into custom assemblies, standard sub assemblies, devices and new products. The custom assemblies part of the business, which incorporated the existing district plant concept, met the criteria for investment laid down by Mr. Tyaack and accordingly, the June 15th strategic directive to investigate and evaluate a move to plants in each major market area applied specifically to it. We are satisfied on the contents of the appropriation request document and the other evidence before us that the company's decision to locate its custom assembly operations in regional plants was made on the basis of business and economic considerations. The company looked to the competitive threat posed by Federal Pioneer, the marketing and service advantages of locating within specific market areas, and the state of its existing plant in Hamilton. The Board is entitled to draw inferences from the site selection criteria used to choose a new site as to the motive underlying the company's decision to leave the old site. In the case of custom assembly, in contrast to devices and standard sub assembly, the criteria used to select the new sites are devoid of anti-union con-

siderations. The company looked to the proximity to buying influences and sales offices, the size of plant population vis-a-vis community population and the presence of custom carriers. These factors could not have been accommodated in Hamilton or by the relocation of custom assembly to the site of the company's property in Burlington. We are satisfied that the decision of the company to locate its custom assembly plants outside of Hamilton was not motivated by anti-union factors and is not, therefore, in violation of the Act.

61. The market and competition related factors which supported the decision to relocate the custom assembly part of the business do not apply to devices and standard sub assemblies. Furthermore, in contrast to the decentralization of custom assemblies the tariff sensitivity and dependence on American technology of devices are not affected by decentralization. The decision of the company to invest in these parts of the business (\$11 million) was contrary to the investment strategy laid down by Mr. Tyaack in June and must be carefully reviewed by the Board (especially in light of the fact that it was not considered imperative to vacate the premises until after the commencement of a lengthy strike).

62. The devices and standard sub assemblies operations are housed in the Aberdeen Avenue facilities and the evidence establishes that the condition and suitability of these facilities were non-union related factors which, in part, led to the decision to relocate. We say in part because it is clear on the evidence that as of January, 1978 Mr. MacNeil was content to remain at the Aberdeen Avenue plant provided some additional funds were committed to the facilities. He admitted that the facilities were adequate and further that the lease could probably be renewed. Mr. Tyaack, after completing his analysis of the factory economics and visiting the factory in early 1978 did not recommend a relocation at that time. Indeed, in June, Mr. Tyaack was content to operate the devices part of the business without heavy investment. He also commented in his memo of June 15th that "For S & C self manufacture of devices to be a better alternative (to producing a zero tariff situation) its IBT margins would have to be at least double those of the off shore facilities." Mr. MacNeil picked up this theme and hit upon the idea of improving productivity and thereby qualifying the devices and standard sub assemblies parts of the business for investment. The only way in which he could accomplish his objective, however, was to relocate beyond the union's jurisdiction.

63. The purpose of *The Labour Relations Act* is to provide a statutory framework within which employees are encouraged to join together and bargain collectively with their employer. The underlying assumption is that employees who bargain collectively are on a more equal footing with their employer than unorganized employees and have a greater say in determining their terms and conditions of employment. It is axiomatic, therefore, that collective bargaining as established under the Act has an economic impact in terms of both the price of labour and the scope of the employer's unilateral authority. Under our Act the employee's share of the economic pie and the scope of management's authority vis-a-vis employee relations must be determined at the bargaining table and against the backdrop of possible economic sanctions by either side. An employer whose employees have decided to bargain collectively cannot escape his obligations under *The Labour Relations Act* and any decision taken to avoid these obligations or to defeat the legitimate collective bargaining aspirations of his employees is in violation of the Act. Under our statute accommodation is sought at the bargaining table. An employer who contracts out his work, relocates or closes his plant or takes any other major business decision to avoid having to deal with his employees collectively through a trade union or to avoid the possibility, in the abstract, of being subject to economic sanctions is guilty of an unfair labour practice and the Board has so

found in a number of cases including *Academy of Medicine, supra*, *Humber College, supra*, and *Consolidated Sand and Gravel, supra*.

64. In many cases the employer will argue economic justification for a business decision which has an adverse impact on the bargaining unit. If an employer acts because his premises are antiquated or because his market is expanding or shrinking or because of transportation factors or for a range of other economic or business reasons which are unrelated to collective bargaining he is clearly not motivated by an anti-union animus and is not restricted, therefore, by *The Labour Relations Act*. Indeed, section 68 of the Act expressly provides that so long as what he is doing is not a strike or lockout he can discontinue operations for cause regardless of the impact on the bargaining unit and the collective bargaining rights of employees.

65. Can an employer faced with economic difficulties caused by collective bargaining-related factors (wages, benefits, seniority, work practices etc.) act to remove himself from his collective bargaining relationship? It may well be that it is more profitable to operate without a union than with one but if an employer can react to this reality simply by moving his business the right of employees to engage in collective bargaining would be seriously undermined. What of the employer who is faced with an economic crisis caused by collective bargaining related factors, seeks relief from the union and is met with an unsympathetic or unsatisfactory response? Assuming that these factors could be established, the answer is by no means clear. The question, however is not raised by the facts of this case. This company was not faced with an economic crisis and notwithstanding the constraints to productivity perceived by it, there is no evidence that the company ever raised its concerns with the trade union prior to making its decision to relocate.

66. Collective bargaining as established under the Act has an economic or productivity component to it. Indeed, the strike record at the Hamilton plant would have had a telling impact on productivity. Having regard to the nature of collective bargaining and the rights conferred on employees under the Act, projected productivity improvements or a projected increased return on investment resulting from the relocation of a unionized plant, do not establish the absence of an anti-union motive. This is particularly so where an imminent financial crisis does not exist and where there is no evidence that the company ever raised its concerns with respect to productivity at the bargaining table. When reference is had to the 1977 return on investment, the failure of the company to attempt to deal through the trade union in respect of productivity and the evidence which is analyzed in the following paragraphs, we are of the view that the company's decision to relocate was motivated in large part by anti-union considerations.

67. We now turn to a consideration of this other evidence. Mr. Tyaack proposed internal investment criteria which he hoped would make the company more profitable in the long run. The devices and standard sub assemblies part of the S & C business did not qualify for substantial investment under these criteria. Mr. MacNeil in turn sought to remove these parts of the business from the investment constraints which would be placed upon them by the adoption of Mr. Tyaack's investment criteria. He concluded that he could attract investment to his division by devising a plan which would result in improved productivity and a more attractive return on investment. By his own evidence, Mr. MacNeil was of the view that in order to accomplish this objective the devices portion of the business had to start from scratch and, as is clear from his evidence in cross-examination, this meant without a

union contract “in a management controlled plant without a trade union.” He testified that the company looked at all of the factors in a union contract. In light of this evidence it is not surprising that the matter was not raised with the union at the bargaining table. Mr. Tyaack spoke of the risk of the adversary relationship carrying on between negotiation and interfering with opportunities for management and employees to work together in improving the quality of working life. The evidence of these two company officials, when viewed in the context of an existing union/ management relationship, supports the conclusion that the company was attempting to escape its legal collective bargaining obligations and operate without a trade union. The documentation upon which the decision to relocate was made amply underscores the thinking of the senior operating executives in this regard.

68. The appropriation request records “participative management program transfer to multi-plant operation with non-union operation as objective for all new plants” as a major strategic objective. The document states that “while many programmes have been instituted to improve communications and increase worker commitment, they have been limited by the constraints of a city-wide contract and the accompanying peer pressures.” These concerns refer directly to the collective agreement and there was no evidence that the company even tried to remove or even lessen these perceived constraints at the bargaining table. Indeed, there was no evidence that these considerations as they relate to devices and standard sub assemblies were placing the employer in an untenable or unfair position in the marketplace.

69. The document describes two sets of site selection criteria; one pertaining to custom assembly plants, the other to devices and standard sub assembly plants. As noted, the custom assembly site selection criteria relate to market transportation factors and size of community and labour pool. The site selection criteria for devices and sub assembly plants as set out in paragraph 17 herein, however are tied directly to the desire of the company to operate these plants without a trade union. The company determined that it would only locate in an area if not more than 50 per cent of the manufacturing population was unionized and if there was no unionized electrical membership in the manufacturing community and that it would not locate within 20 miles of any community which did not meet the above criteria. The company determined further that it would not locate within 40 miles of Hamilton, London and Port Hope. The company has unionized personnel located in each of these communities. The Board is entitled to consider the selection criteria for the new site as evidence of why the company left the old site, where the company is party to a union/management relationship at the old site and where the selection criteria for the new site are set out in the document upon which the decision to go ahead with the relocation has been made. When the site selection criteria are considered in light of the viva voce evidence of Messrs. MacNeil and Tyaack and against the backdrop of an existing, albeit strained, union/management relationship, further support is found for the finding that the company was motivated by a desire to rid itself of the trade union.

70. The evidence establishes that the company owned 26 acres of land in Burlington prior to purchasing land in Alliston, Perth and Mount Forest for the purpose of locating manufacturing plants in these communities. Contrary to counsel for the company’s understanding of the evidence, Mr. MacNeil was asked in cross-examination if there were reasons other than those set out in the site selection criteria shown in the appropriation document for deciding not to relocate to Burlington. He testified that there were not. He further testified that the Burlington site could have accommodated the Switchgear and Control reloca-

tion. With the exception of the site selection factors, therefore, Burlington would have satisfied the other strategic considerations. Mr. Tyaack made reference to diseconomies of scale and to the fact that Burlington “flunked” on the site selection criteria in explaining the decision of the company not to relocate to Burlington. We are not prepared to accept that the company was incapable of designing a plant in Burlington to eliminate the diseconomies of scale referred to by Mr. Tyaack. It could have done so at considerably less than the cost of purchasing land and building separate plants in Alliston, Perth and Mount Forest. The company, however, chose to leave its land vacant in Burlington and the evidence is clear that the only reason it did so was to avoid having to deal with a trade union at its new plants. Indeed, the relocation to sites far removed from the existing unionized plant in circumstances where the relocation could have been made to an already owned site in the immediate area may be in violation of the Act where the site selection is based on a desire to prevent existing unionized employees from following their jobs. This company was not establishing a new operation but relocating a unionized one and in these circumstances the application of the site selection criteria may be seen as an act of discrimination against the company’s unionized employees.

71. The Municipality of Burlington abuts the City of Hamilton where the company’s existing plant is located and where its existing unionized employees work. If the company had relocated to Burlington its existing employees would have been within easy commuting distance. If the company had not extended some form of employee transfer rights, a significant portion of the employees affected by the relocation would have applied for employment at the new Burlington plant and the company would have been hard pressed to deny them employment if they had been satisfactory employees at the old plant. Indeed, the company could have maintained the bulk of its work force if it had relocated to Burlington. Instead the company chose to ignore the 26 acres it already owned in Burlington and move at least 40 miles from Hamilton where its existing employees would no longer be within easy commuting distance. The company also decided to allow the “employees who remain (to) exercise their rights under the terms of their union contracts and bump into other Hamilton divisions or be laid off.” We can come to no other conclusion on this evidence than that the company was motivated by more than a general desire to avoid unionization at its new plants. This evidence satisfies the Board that the company was determined to remove the Hamilton based devices and standard sub assembly plants to a location where potential support for the complainant union would be dissipated. In the company’s mind the only way in which it could achieve the desired productivity gains was to escape the complainant trade union.

72. The evidence of Mr. MacNeil establishes that he was aware from the outset that he would be asked how productivity improvements could be made in a union plant and further, that he planned to be in a position to respond by stating “in a management plant without a union.” His objective in this regard set the stage for the decision-making which followed. When reference is had to his evidence and that of Mr. Tyaack in respect of the advantages of operating union free, to the documentation drawn up in support of the relocation alternative which reflects the thinking of Messrs. MacNeil and Tyaack in this regard and in particular, the device and standard sub assembly site selection criteria, the Board is compelled to conclude that the company’s decision to relocate the devices and standard sub assemblies part of its business was motivated, in large measure, by its desire to operate this segment of its business without the encumbrance of the complainant trade union. The Board’s finding in this regard is underscored by the lack of evidence that the company ever

attempted to deal with the trade union at the bargaining table in respect of what it perceived to be union related constraints to productivity improvements. We are satisfied on the evidence that in addition to considering the suitability of its existing facilities, the company was strongly motivated by a desire to eliminate the need to deal with its employees on a day-to-day basis through their lawfully selected and long-standing bargaining agent. Indeed, we go so far as to state that even on an application of the predominant motive test, the company's actions would be unlawful. The employees of the company affected by the decision to relocate these parts of the business are entitled to be represented in their employment relations by a bargaining agent of their choice and this choice is protected under *The Labour Relations Act*.

73. Section 58 of the Act makes it unlawful for an employer to refuse to employ or continue to employ a person or discriminate against a person in regard to employment or any term of condition of employment because the person is or was a member of a trade union. In this case the full effect of the company's decision to relocate upon its unionized employees is yet to be felt. At the very least, all of the Hamilton based employees engaged in the manufacture of standard sub assemblies and devices will be removed from their existing jobs. Having regard to the anti-union motivation of the company's decision to relocate, this result alone is sufficient to bring the company's actions within the actions proscribed by section 58 of the Act. Depending upon the rate of expansion of the other divisions remaining in Hamilton, a number of employees engaged in the manufacture of devices in Hamilton or less senior employees in the company's other Hamilton divisions may be laid off. Any employee laid off as a result of the company's decision to relocate its devices and standard sub assembly manufacturing facilities will have had his employment interrupted or terminated in violation of section 58 of the Act.

74. Section 56 of the Act prohibits an employer from interfering with the representation of employees by a trade union. The decision of the company to relocate to Alliston, Perth and Mount Forest was made, in part, for the purpose of eliminating the representation of its device and standard sub assembly employees by the complainant trade union and is, therefore, also in violation of section 56 of the Act.

75. We also note that the rationale in support of the alternative to relocate was made during the course of a 4 month strike and in the supporting documents reference is made to the number of man days lost to strike since 1972 and to the "vulnerability of the centralized operation." In many respects the motivation of the company in this case, in so far as it emanated from a concern as to the vulnerability of its centralized operations to the threat of strike, is the same as that which led the employer in the *Humber College* case, *supra*, to subcontract its security work. The Board found in that case that the employer "acted to ensure continuity of college security services in the event of a future labour strike because it saw itself as vulnerable in the circumstances of a strike." The Board went on to state that:

"This is a case where the employer seeks to insulate itself from the natural and inevitable consequences of the exercise by the security guards of their right to strike ... Reduced to its simplest terms the employer acted because he saw himself as vulnerable due to the necessary discontinuance of his in-house security during the period of a strike."

The Board found that the employer had unlawfully discontinued the employment of its se-

curity guards. The evidence in this case satisfies the Board that the company also put its mind to the extent to which its employees had exercised their right to strike in the past and its vulnerability to the exercise of that right in the future in deciding to relocate its device manufacturing facilities. Clearly, the company was not responding to the issues which precipitated the 1978 strike. Those issues had been settled at the bargaining table. Rather, this company was concerned in the abstract with the possible future exercise of the right to strike by its employees. The right to strike at certain prescribed times is a fundamental right extended to employees under *The Labour Relations Act*. Accordingly, we must find that the company violated sections 56 and 58 of the Act in deciding to relocate its Hamilton based device and standard sub assembly manufacturing facilities for the purpose of making the division less vulnerable to the threat of strike.

76. In summary, corporate investment criteria were laid down in March, 1978 which had the effect of restricting investment to parts of S & C's business. The devices part of the business in particular did not qualify for investment under the criteria because of tariff sensitivity and technological dependence. Without any capital investment Mr. MacNeil estimated that the business, which had earned a 12 per cent return on investment in 1977, could exist as a "cash cow" for 5 to 10 years. The evidence shows that Mr. MacNeil addressed himself to the implications arising from the investment strategy laid down by Mr. Tyaack and concluded that he could attract investment to those parts of the division not otherwise entitled if he could demonstrate productivity gains which would be reflected in an improved return on investment. Mr. MacNeil saw productivity improvement as an alternative to meeting the tariff and technology requirements set down by Mr. Tyaack. He recognized that the first question he would be asked in seeking investment on the basis of productivity gains would be how he could achieve sufficient productivity improvement in a union plant. By his own evidence he planned to be in a position to reply that he could do so in a management controlled plant without a trade union; without the restrictions of a union contract and the vulnerability to legal work stoppages. The only way in which Mr. MacNeil could accomplish his objective was to relocate beyond the scope of the union's recognition and preferably to a location where the existing unionized employees would not follow. In these circumstances it is not surprising that the company did not attempt to seek concessions from the union at the bargaining table. The company was intent on realizing an improved return on investment which had as a necessary ingredient the operation of union free plants. The company, as party to a legal collective bargaining relationship, made a decision to reap the economic benefits of operating union free by substituting non-union employees for its unionized employees, and in so doing violated the protections afforded to unionized employees under the Act.

IV Lock-out

77. We now turn to a consideration of the union allegation that the decision of the employer to relocate its Switchgear and Control division constitutes a lock-out within the meaning of the Act and is unlawful because of the existence of a subsisting collective agreement. A lock-out is defined in section 1(1) (i) of the Act as:

" 'lock-out' includes the closing of a place of employment, a suspension of work or a refusal by an employer to continue to employ a number of his employees, with a view to compel or induce his employees, or to aid another employer to compel or induce his employees, to refrain from exercising any

rights or privileges under this Act or to agree to provisions or changes in provisions respecting terms and conditions of employment or the rights, privileges or duties of the employer, an employers' organization, the trade union, or the employees;"

A lock-out is comprised of two elements, the act and the motive or purpose for the act. It is not sufficient merely to show that there has been a closing of a place of work or a suspension of employment in order to establish the existence of a lock-out. It must also be established that the employer acted with a view to induce or compel his employees to refrain from exercising any rights or privileges under the Act or to agree to provisions or changes in provisions respecting terms or conditions of employment. (see *Humpty Dumpty*, *supra*, and the cases referred to therein).

78. In the *Ralph Milrod Metal Products* case, [1977] OLRB Rep. Feb. 79, the Board stated that "the definition of lock-out' as it is presently worded would appear to include any situation in which an employer's refusal to employ employees is grounded in an unfair labour practice." In reconciling this statement with the line of lock-out cases in which the Board has attempted to ascertain motive on the basis of whether or not the action of the employer is revocable, a useful and relevant analysis appears at paragraphs 14 and 15 of the *Rondar Services Limited* case [1977] OLRB Rep. Oct 655 wherein the Board commented:

"In the line of cases relied upon by the company the Board has looked to whether or not the objective acts of the employer (i.e. the refusal to employ etc.) were revocable or irrevocable. If revocable, then clearly an inference can be drawn as to the subjective element of the definition (i.e. the compelling or inducing to refrain from exercising rights etc.) and a finding made that the refusal to continue to employ is being used as a lever to effect an alteration or modification of employment behaviour within the meaning of lock-out as set out in Section 1(1) (i) of the Act. (See re *Harry Woods Transport* case, [1976] OLRB Rep. July 341 where such an inference was drawn.) If, on the other hand, the evidence establishes that the company's decision to refuse to continue to employ is irrevocable, then it is more difficult to draw the inference that the sanction is designed to effect a modification or alteration of employment behaviour in those whom the employer has refused to continue to employ, and indeed, in a number of cases a finding that the decision of the company was irrevocable has led to a dismissal of the application. (See *Livingston Transportation Limited* case, *supra*.)

Does this mean that in order to establish that a lock-out has occurred a union must establish that the decision taken by the company in respect of those it refuses to continue to employ was a revocable one? The answer is no. Whereas the objective element of the definition encompasses 'a refusal by an employer to continue to employ a number of his employees' the subjective element requires that the refusal be 'with a view to compel or induce his employees to refrain from exercising any rights or privileges under the Act ...' The definition contemplates and catches an irrevocable decision taken by an employer to refuse to continue to employ some of his employees with a view to compel or induce other employees to refrain from exercising rights under the Act, etc. This is clear from a reading of the definition and fits within the

policy considerations referred to above. It is within this context that the statement in the *Milrod* decision (*supra*) must be read.

If it can be shown that an employer's refusal to continue to employ a number of his employees is rooted in an anti-union animus and if there are other employees who may be influenced within the meaning of the definition, an inference can be drawn that the motive for the employer's action falls within the statutory definition of 'lock-out'. It can be inferred that the employer's decision is designed, at least in part, to modify or alter the behaviour or conduct of those employees who remain in his employ."

79. We have found on the evidence that the company was concerned with the extent to which its employees in Hamilton (both Switchgear and Control Division employees and others) had exercised the right to strike and had acted to relocate the devices and standard sub assembly operations in part from a desire to insulate itself from possible strike action in the future, in other words to make the division less vulnerable to the threat of strike. While it is clear on the evidence that the company's decision to relocate was an irrevocable one, it affected only about one half the 1,200 Hamilton based employees of the company. The remaining employees were as much on strike when the plans to relocate were formulated as were the Switchgear and Control employees and those employees contributed proportionately to the unenviable strike record which existed at the Hamilton plants. The company contemplated that the Switchgear and Control division employees affected by its decision to relocate that division would bump into the other divisions in accord with the city-wide seniority clause in the collective agreement. When the anti-union motive for the company's decision to relocate the Switchgear and Control Division is considered along with its bumping impact on the remainder of the Hamilton bargaining unit, should we draw the inference that the employer acted, in part, to send a message to all its Hamilton employees that they should refrain from the exercise of their right to strike?

80. There is no evidence that the company sought to induce or compel employees to agree to terms and conditions of employment other than as contained in the collective agreement. There is no evidence that the company sought to interfere with the representation rights of those who remained in Hamilton. If the union is to establish a lock-out it must be on the basis that the company sought to compel or induce those employees remaining in Hamilton to refrain from the exercise of the right to strike. Messrs. Tyaack and MacNeil testified openly and forthrightly in respect of the company's decision to relocate its Switchgear and Control Division. The union had full opportunity to cross-examine but failed to question either of them with respect to their desire, if any, to cause the remaining employees to refrain from exercising their right to strike. The documentation in support of the decision to relocate was put in evidence and nowhere is mention made of the possible refraining impact of the decision upon employees remaining in Hamilton. In the absence of any direct evidence or cross-examination of the senior executives on this critical point we are not prepared to draw the inference which the union asks. Accordingly, this complaint, in so far as it alleges the company's relocation of its Switchgear and Control Division constitutes a lockout, is dismissed.

IV REMEDY

81. The Board has been given exceedingly broad powers under section 79(4a) of the

Act to shape effective remedies to breaches of The Labour Relations Act. Section 79(4) provides:

“Where a labour relations officer is unable to effect a settlement of the matter complained of or where the Board in its discretion considers it advisable to dispense with an inquiry by a labour relations officer, the Board may inquire into the complaint of a contravention of this Act and where the Board is satisfied that an employer, employers’ organization, trade union, council of trade unions, persons or employee has acted contrary to this Act it shall determine what if anything, the employer, employers’ organization, trade union, council of trade unions, person or employee shall do or refrain from doing with respect thereto and such determination, without limiting the generality of the foregoing may include, notwithstanding the provisions of any collective agreement, any one or more of:

- (a) an order directing the employer, employers’ organization, trade union, council of trade unions, employee or other person to cease doing the act or acts complained of;
- (b) an order directing the employer, employers’ organization, trade union, council of trade unions, employee or other person to rectify the act or acts complained of; or
- (c) an order to reinstate in employment or hire the person or employee concerned, with or without compensation, or to compensate in lieu of hiring or reinstatement for loss of earnings or other employment benefits in an amount that may be assessed by the Board against the employer, employers’ organization, trade union, council of trade unions, employee or other person jointly or severally.”

82. The importance of the power given to the Board under section 79(4) in the effectuation of the statutory policy of the Act and the corresponding responsibility which falls to the Board in exercising this power are carefully analyzed in para. 93 of the recent *Radio Shack* case, [1979] OLRB Rep. Dec. 1220, as follows:

“it is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop ‘boiler plate’ remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable; they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation. Remedies should also be sensitive to the interests of innocent by-

standers. This means then that the Board should try and tailor remedies to each particular case. It is equally true, however, that the Ontario Labour Relations Board cannot police the entire labour relations arena. As important as it is for this Board to safeguard the substantive rights it administers, ultimately, compliance with the Act depends on the vast majority of unions and employers according at least minimal respect to the legislation, the Board and the Board's directives. With its limited resources and the time that must be taken to adjudicate fairly issues of controversy, the Board must rely on the co-operation of employers and trade unions in the day to day administration of the Act. For this reason, the Board cannot get too far ahead of the expectations of the parties it regulates. It must be concerned that its decisions are perceived, in the main, as reasonable and fair to attract as much self-compliance as possible. It has therefore been said that the ideal Board order must be both an instrument of education and of regulation. See generally St. Antoine, *A Touchstone for Labour Board Remedies* (1968), 14 Wayne L. Rev. 1039; Ross, *Analysis of Administrative Process Under Taft-Hartley*, [1966] Lab. Rel. Yearbook 299."

The Board in the *Radio Shack* case, *supra*, drew three basic principles from the considerations set out above. These are firstly, that a remedy is not a penalty; that is, the authority of the Board is to compensate or otherwise make whole but not to punish. Secondly, that monetary relief is compensatory and thirdly, that a collective agreement cannot be imposed as a remedy to a bargaining in bad faith finding.

83. In this case the Board is faced with the task of shaping a remedy which redresses the effect of the company's decision upon both the employees and the trade union. The employees of the Switchgear and Control Division have lost, or will lose, their individual jobs and some of them as well as other employees of the company may lose their employment as a result of the company's unlawful decision to relocate. The union has lost a significant portion of the bargaining unit it represents because of the desire of the company to operate parts of its Switchgear and Control Division union free. The Board has the authority under section 79(4) of the Act to order the respondent company back to Hamilton and thereby re-establish the status quo. It would not be the first time this Board has ordered a "runaway shop" to return to its original location. In the *Humpty Dumpty* case, *supra*, the Board found that an employer's closure of his place of business in London, Ontario and his relocation to a number of small warehouses immediately adjacent to London from which he intended to service his same customers with his same employees, constituted a lock-out within the meaning of the Act. The employer's decision to relocate in that case lacked any semblance of a business purpose. The Board, acting under its section 83 remedial authority, ordered the company to either return to London or extend the scope of the agreement it had just entered into with the union to cover its new warehouses outside London. Similarly, the National Labour Relations Board extended the union's recognition to the site of a relocated plant in *Royal Norton Manufacturing Company* [1971] CCH NLRB ¶12,891

84. This case presents a number of factors which must be considered by the Board in drafting a suitable remedy which were not present in the *Humpty Dumpty* case. In the first place we have found that some legitimate business purpose exists for the relocation in this case. The evidence establishes that the company considered the suitability of the Aberdeen Avenue facilities in coming to the decision to relocate. We have found these considerations

to have been legitimate notwithstanding the more pressing desire to escape the trade union. We have no authority to order the company to invest the funds necessary to put the Aberdeen Avenue facilities on a solid long-term footing (beyond 10 years). The existence of a mixed motive and the evidence as it relates to the long-term suitability of the Aberdeen Avenue facilities mitigate strongly against ordering the company to return to this location. In the circumstances the Board is of the view that it should explore other remedial options which would redress the employer's breach of the Act but would not require the company to return to premises which have marginal long-term potential for the employees, the trade union and the company.

85. Fundamental to any remedial order which does not require the employer to return to Hamilton, is employee access to the jobs which are being moved from Aberdeen Avenue to Alliston, Perth and Mount Forest. If the employer is to be allowed to maintain his operations in these communities the employees who have a stake in their jobs must be permitted to follow them. Any consideration of meaningful access must focus on the elimination of monetary penalty to the employees involved. If the company had not been motivated by an anti-union animus it might have invested in the Aberdeen Avenue facilities, it might have relocated to Burlington or it might have raised the matter at the bargaining table. While we can speculate to no end about what the company might have done if it had not been motivated by anti-union considerations, the fact of the matter is that the company did not raise the matter at the bargaining table and purposely moved a considerable distance from its existing plants and did so for anti-union reasons. In the circumstances we have no hesitation in concluding that if the operation is not brought back to Hamilton the company must bear the burden of all monetary considerations which would normally face an employee in relocating to a new community. The monetary considerations to which we refer include not only the costs of moving and physically relocating but the prevention of a unilateral and immediate removal of economic gains legitimately achieved through collective bargaining.

86. When we turn our attention to the preservation of these gains, consideration must be given to extending the collective agreement to cover employees at the new locations. An extension of the collective agreement would allow the employees to maintain their existing terms and conditions of employment including not only wages but those benefits such as pension and life insurance which might be difficult to replace. Employee concern over the possible discontinuation of these "age related" benefits would, in our view, significantly inhibit the movement of employees to the new locations. An extension of the collective agreement, however, would also impose a whole range of terms and conditions which might have no relevance to the new operations and would as well result in an automatic extension of the union's recognition. Consideration of this possibility raises additional distinguishing factors between this case and the *Humpty Dumpty* case, *supra*. In the *Humpty Dumpty* case the evidence established that the employer intended to operate in the same geographic area with the same employees. The Board, therefore, did not have to concern itself in that case with the possible penalizing effect of imposing a collective agreement negotiated in one labour market area on company operations located in another.

87. More importantly, the Board did not have to concern itself with balancing the interest of employees represented by the trade union and those not represented by the trade union. In the *Humpty Dumpty* case, *supra*, the company remained within the same area and by design retained the same employees. While it is our intention to eliminate all monetary

considerations which would normally enter into an employee's decision to relocate, many employees may prefer to remain in Hamilton. Mr. Tyaack indicated that no one would be laid off as a result of the decision to relocate and by implication that the Switchgear and Control employees could be absorbed into the other Hamilton Divisions. We have no way of knowing how many Hamilton based employees will relocate and how many will be hired at the new plants from the local labour markets. Those who might be hired locally are the "innocent bystanders" referred to in the passage cited from the *Radio Shack* decision, *supra*. Having regard to their presence we must consider the implications of extending the union's recognition to the new plants without testing employee support.

88. There is another compelling reason for our concern in this regard. In our view meaningful collective bargaining is best served by substantial employee support for the bargaining agent and a recognition of that support by the other side. The certification procedure is designed to confirm the necessary degree of employee support and thereby eliminate the need to test employee support on the picket line. If employee support is confirmed and recognized, negotiations become issue oriented rather than recognition oriented and the union is in the healthy position of bringing employee support to bear on the issues in dispute. If the Board was to simply extend the union's recognition to the company's new plants. The effect would be to impose a trade union on employees who have not made the choice themselves. By so doing the Board might well be laying the seeds of an unhealthy collective bargaining relationship. The better alternative, in our view, is to frame a remedial order which provides job access to employees and reimbursement for organizing costs. If the union's bargaining rights are not transferred to the new sites, it must be given access to the employees at these new sites and the cost of organizing at these locations must be borne by the company. This type of remedy is not novel in the field of Labour Relations. (See *Garvin Corporation*, [1976] CCH NLRB ¶9,503; *Academy of Medicine*, *supra*, and *Radio Shack*, *supra*.)

89. We have taken into account the economies and the psychology permeating the situation at issue and in addition the interests of "innocent bystanders" and in so doing we have concluded that this is not a case in which to order the employer to return to Hamilton. Having reached this conclusion, the remedial order of the Board must provide the affected employees with meaningful access to their jobs and the cost of this access must be borne by the company. In weighing the relevant factors the Board has come to the further conclusion that it should not extend the collective agreement to the new locations and with it the union's bargaining rights. If the order of the Board is to remedy the company's unlawful activity against the trade union, however, the union must be given access to the employees at the new locations and be reimbursed their organizing costs. We are satisfied that the remedial order which follows effectively remedies the unlawful activity of the company in a fair and sensible manner.

90. The order of the Board which follows is based on the assumption that no employee presently working in Hamilton will lose his job as a result of the company's breach of the Act. Mr. Tyaack testified that he did not foresee any layoffs in Hamilton other than for those hired on a temporary basis subsequent to January 1, 1979. His projections were based on an expectation that existing Switchgear and Control employees would bump into the remaining Hamilton Divisions. We expect that even the temporary employees hired subsequent to January 1, 1979 can be accommodated in Hamilton as a result of the access provided regular Switchgear and Control employees to the relocated jobs. Notwithstanding our

expectation, however, we remain seized in the event that any employee presently working in Hamilton is laid off or otherwise terminated from employment as a result of the company's decision to relocate the Devices and Standard Sub Assemblies parts of the Switchgear and Control Division. We also remain seized in the event of any difficulty in the implementation of our remedial order.

ORDER OF THE BOARD

- (1) The respondent company is hereby directed to offer all regular employees of the Switchgear and Control Division engaged in the manufacture of devices and/or standard sub assemblies the choice of:
 - (a) exercising their seniority under the terms of the subsisting collective agreement between the parties to claim jobs falling within the scope of that agreement in Hamilton,

or

 - (b) maintaining their existing jobs or substantially equivalent jobs at the new locations.
- (2) Employees will be given 60 days from the date of the Board's decision in this matter, or 60 days from the date the company asks the employee to make an election, whichever occurs later, to elect one of the options set out above.
- (3) The respondent company is hereby directed to provide employees who elect to relocate:
 - (a) the terms and conditions of employment which the company puts into effect at the new location save and except that:
 - (i) the hourly rates of pay of these employees will be "red circled" and will remain at the existing level until the hourly rate for the job at the new location exceeds the "red circled" rate
 - (ii) the "age related" benefits of pension and life insurance of these employees will be maintained without change;
 - (b) reimbursement from the company for all reasonable transportation, commuting or temporary housing costs in connection with the relocation for up to 1 year from the date of this decision or 1 year from the commencement of work at the new location, whichever occurs later;
 - (c) reimbursement from the company for all reasonable moving and relocation costs including the cost of physically transporting personal possessions and the legal fees incurred in the sale and/or purchase of a residence. An employee will be entitled to claim these costs at any time within 2 years from the date he commences to work at one of the new locations.

- (4) The most senior employee who relocates to a particular location will be considered by the company as the first hired at that location and so on down to the least senior employee who relocates. The least senior employee who relocates to each location will be considered by the company as having been hired at that location before anyone not relocating.
- (5) The respondent company is to provide the complainant trade union with a list of employees' names and addresses at each of its new locations. The list is to be updated monthly for a period of one year from the date of this decision or from the commencement of operations at any of the new locations, whichever occurs later.
- (6) The respondent company is to provide the complainant trade union with access to all employee notice boards at the new locations for the purpose of posting union notices, bulletins, and other union literature for a period of 1 year from the date of this decision or 1 year from the commencement of operations at any of the new locations, whichever occurs later.
- (7) The respondent company is directed to allow the complainant trade union to convene up to three one hour meetings of all the employees on each shift at each of the new locations for the purpose of allowing representatives of the complainant union to address the assembled employees. These meetings will take place during working hours and within 1 year from the commencement of operations at any location, whichever occurs later. Each meeting is to be held within ten days of a request being made in writing by the complainant trade union.
- (8) The respondent company is directed to reimburse the complainant trade union for all reasonable costs incurred by it in attempting to organize each of the company's plants for the one year period following release of this decision or for the one year period from the commencement of operations at each plant, whichever occurs later.

DECISION OF BOARD MEMBER J.A. RONSON:

1. Westinghouse Canada Limited ("WCL") operates three divisions out of two plants in Hamilton, one plant at Aberdeen Avenue and the other at Beech Road. The head office of WCL is located on Sanford Road in Hamilton.
2. The Switchgear and Control Division ("S & C Division") is located at the Aberdeen Avenue plant. S & C Division produces electrical products which are the equivalent of products produced by eight divisions of the parent company, Westinghouse Electric Corporation ("WEC"), in the United States of America. S & C Division is divided into 16 profit and loss centres or product groups. For purposes of control, each product group is treated as if it were a separate business. Each product group has its own strategy subject to the overriding strategy or policy of the Division. In addition, the various product groups have been parcelled into segments according to their common characteristics:

- (a) Devices: parts which can be used independently or in conjunction with each other e.g. watthour meters, low voltage circuit breakers;
- (b) Standard sub-assemblies: parts which are common to different products e.g. motor starter wrappers; and
- (c) Custom assemblies: special design assemblies which are used in a finished product for a specific customer.

3. In 1969 S & C Division opened a district plant in Vancouver, in order to work closer with its customers and to be in the market centre. The concept was not successful until 1973 when the district plant moved into a new building. In 1976 S & C Division opened a second district plant in Calgary and it was a success from the start. The district plants were treated as a product group.

4. Historically, the electrical industry in Canada was fostered in 1903 by the erection of a protective tariff wall against foreign imports. This encouraged foreign manufacturers, such as WEC, to establish branch plants in Canada to service the Canadian market. Prior to 1978 S & C Division was operating within this branch plant strategy and under the theory that economies of scale ("big is better") maximized profits. In 1972 S & C Division proposed that it move to a new location twenty miles from Hamilton. An appropriation of some 12 million dollars was made and land was purchased in Burlington. The Burlington land was also to be used by the appliance division of WCL for a new plant. S & C Division designed a single storey building using new manufacturing processes and with freedom from space constraints. In the summer of 1975, S & C Division announced the proposed move. On the same day, the proposed move was cancelled when WCL announced that its appliance division, which was also housed at the Aberdeen Avenue plant, was going to be sold.

5. Ultimately the appliance division was sold to CAMCO, a corporation in which Canadian General Electric, a competitor to S & C Division, is involved. Part of the Aberdeen Avenue plant was sold to CAMCO and part remained with WCL. S & C Division remained at Aberdeen Avenue and leased some of its space from CAMCO. This lease expires in 1982 and there is no renewal clause.

6. Following the cancellation of the move to Burlington S & C Division was put on a "minimum sunk cost" basis regarding expenditures at the Aberdeen Avenue plant. No money was to be spent at Aberdeen Avenue unless it could be repaid quickly and no capital investment was allowed on items that would stay at Aberdeen Avenue if S & C Division was to leave. By way of example a program to upgrade the electrical system at the plant, budgeted at \$500,000, was stopped.

7. The effect of such a policy was to turn S & C Division into what was described as a "cash cow" i.e. WCL would milk S & C Division for all the return it could get and then close down the Aberdeen Avenue works. The timing of such a closing would be 5 to 10 years in the future depending on when the plant, in effect, wore out.

8. Since 1946 the Applicant Union has represented the bargaining unit employees of WCL in Hamilton. Since that time the number of such employees has declined from 6,000 to 1,200 as WCL closed down or moved 2/3 of its operations in Hamilton. Since 1950 WCL has

closed down or moved over 20 manufacturing facilities in and from Hamilton. At all material times S & C Division employed approximately 600 bargaining unit employees.

9. The present collective agreement and its predecessor recognize the applicant Union as follows:

ARTICLE 1.

Recognition and Scope

1.01. The Company recognizes that the Union is the Collective Bargaining Agent for all of its employees employed on jobs which are at present hourly rated jobs located at 286 Sanford Avenue (hereinafter known as "Sanford Avenue Plant"), 606 Aberdeen Avenue (hereinafter known as "Aberdeen Avenue Plant"), and 1632 Burlington Street East (hereinafter known as "Beach Road Plant") of the Company at Hamilton, save and except the office, technical and personnel staff, watchmen, timekeepers, time study personnel, clerical employees and foremen. It is provided in this connection that no job which is presently hourly rated shall be during the term of this Agreement removed from the bargaining unit.

10. Under Article 3 (headed MANAGEMENT RIGHTS) of the present agreement and its predecessor there is the following: (Exhibit #1)

3.01 It is recognized that management of the plant and direction of the working forces are fixed exclusively in the Company which maintains all rights and responsibilities of management not specifically modified by this Agreement.

The exercise of such rights shall include but not be limited to:

(a) ...

(b) The determination of: The number and location of plants, the product to be manufactured, the methods of manufacturing, schedules or production, kinds and locations of machines and tools to be used, processes of manufacturing and assembling, the engineering and design of its products and the control of materials and parts to be incorporated in the products produced.

11. In 1958, during negotiations, the Applicant proposed the following: (Exhibit #38)

2. If any portion of the bargaining unit production is moved to another location, bargaining rights will remain with the Union, and all provisions of the Collective Agreement will apply in the new location.

In 1961, during negotiations, the Applicant proposed the following: (Exhibit #39)

1.01 Amend to bring in the following protection – that there will be no contracting in or contracting out, where such would deprive bargaining unit workers of employment.

In 1972, during negotiations, the Applicant proposed the following: (Exhibit #49)

Article 1. Amend to Provide that: Any Section or Unit of Plant 1, 2 or 3 of the Company that is moved during the term of this Agreement shall continue to be covered by this Agreement.

The Applicant was not successful in any of these attempts to amend the collective agreement. During the negotiations and lengthy strike from May to September, 1978 the Applicant did not request a similar change in the collective agreement, nor did it ask WCL about its plans for closing down any of its operations in Hamilton.

12. As with the other divisions of WCL, S & C Division works under a five year strategic plan outlining a broad course of action for the period and designed to give S & C Division a competitive edge. Each January the strategic plan is reviewed by the staff of the Division and by March the proposed plan for the next five years is in the hands of the Division Manager. The Division Manager may make modifications to the draft and may seek advice from his superior, in this case the Group Vice-President of WCL in charge of the S & C Division and the Motor Division. S & C Division then presents its proposed plan to the President and the Management Committee of WCL at a workshop session in May or June. Following the session, S & C Division receives its instructions on how or whether it is to proceed.

13. It is noteworthy that the strategic plan prepared by S & C Division in 1976 (Exhibit 10) contains a proposed appropriation for a new district plant to serve the custom assembly market in Ontario. The expense was allocated between the years 1978 and 1980. The proposed Ontario district plant never came into being.

14. In the spring of 1978 the draft strategic plan of S & C Division for 1979-1983 arrived at the desk of the Division Manager, Mr. C. MacNeil. Using the branch plant strategy and within the constraints of the "minimum sunk cost" restrictions it proposed upgrading of the Aberdeen Avenue plant. There is no doubt that the Aberdeen Avenue plant is outmoded. Its buildings range in age from 30 to 60 years. The operations are carried out on a multitude of elevations and since the sale to CAMCO there is a traffic problem. CAMCO also controls one of the access gates to the premises. It would cost more to renovate the Aberdeen Avenue plant to first class standards than it would to construct a new building. Even after such renovations there would remain the communication and materials handling problems of a multi-storey building and the attendant higher operating costs as compared to a single storey building. Mr. MacNeil stated that ever since S & C Division moved into the plant it has been seeking money to upgrade the facilities, that conditions were very crowded and the Division had been "improvising" on the site since 1971. Further he was of the view that even if WCL upgraded the plant, S & C Division would still require another plant for extra space.

15. The normal development of S & C Division's strategic plan did not occur in 1978. In March, Mr. MacNeil attended a meeting chaired by Mr. Frank Tyaack, then the Executive Vice-President of WCL. In 1977 Mr. Tyaack had been sent to WCL by WEC and it was understood by all affected that he was destined to become President and Chief Executive Officer of WCL.

16. Mr. Tyaack testified that at the time of his arrival at WCL, the parent company

was unhappy with the operations in Canada. Since 1950 the return on investment to WEC had averaged 6%, a return that could have been generated by putting its money in the bank. Mr. Tyaack was not familiar with WCL and he proceeded to analyze the strategic assumptions used in its planning. As a result, he became convinced that WCL's branch plant strategy had to change. With tariffs being reduced the electrical industry found itself unable to compete with imports and unable to export its more expensive products. He concluded that there were two possible alternatives open to WEC for the future of the electrical divisions of WCL: (a) liquidate the operations and leave; or (b) expand WCL out of the Canadian market by having the WCL divisions authorized to compete worldwide or to supply to the United States as well as Canada.

17. At the March meeting Mr. Tyaack outlined to the division managers the direction he felt WCL had to take in order to survive. He wanted his managers to make a hard assessment whether their divisions would be competitive without tariff protection. He made it clear to them that if their products were tariff sensitive and dependent on foreign technology, then WEC was unlikely to invest more money in their divisions.

18. Mr. Tyaack had visited the Aberdeen Avenue plant prior to the meeting and his impression was that it was a confused jumble that harkened back to manufacturing operations in the 1930's. With its hundreds of products and thousands of part numbers S & C Division was not amenable to "economy of scale" savings. In his opinion there were too many different products for one factory. An exponent of "small is beautiful" or "economy of specialization", Mr. Tyaack felt that S & C Division would benefit by segmenting its products and producing them in smaller factories.

19. In early 1978 Mr. Tyaack had prepared his own analysis of S & C Division by comparing it to the divisions of WEC in the United States producing the same products. (Exhibits 42 and 43). He concluded that not enough value was being added to a product by S & C Division and that when value was added S & C Division was 20% lower in productivity than comparable operations in the United States. Since the overhead costs of the division were competitive Mr. Tyaack concluded that the Aberdeen Avenue plant was the problem. In his analysis no attempt was made to compare direct labour costs between S & C Division and the U.S. operations.

20. As a result of the March meeting, Mr. MacNeil knew that S & C Division was in trouble. The products of his division were in large part tariff sensitive and dependent on foreign technology. He found it difficult to argue for a future for S & C Division within the new corporate strategy but he and his staff prepared a presentation for a strategic planning workshop held in June of 1978. Buoyed by the success of the district plants in Vancouver and Alberta and encouraged by the example of S & C Division's primary competitor (which had 13 locations across Canada and centralized control on major decisions), he tried to show that S & C Division warranted further assistance.

21. Mr. Tyaack testified that as a result of the June workshop meeting S & C Division was authorized to complete its formal strategic plan and to "flesh out" the concept of decentralization for the division. Mr. Tyaack suggested that custom assemblies and standard sub-assemblies be moved to new plants, but remained doubtful that devices could ever warrant investment under the new guidelines. His memorandum to Mr. MacNeil as a result of the meeting stated in part: (Exhibit #20)

“... It is the developing of Canadian alternatives that is more the issue. Do we self-manufacture? Do we source locally? Or do we abandon that segment? The alternative of losing money on the grounds that we are helping to bring WEC products into Canada is simply not allowed.

Extrapolating to a zero-tariff condition I would think the pressure would be very great to send devices directly from Puerto Rico and Ireland into the Canadian market, in which case WCL needs only WESCO to facilitate this and would not need S & C. For S & C self-manufacture of devices to be a better alternative its IBT margins would have to be at least double those of the off-shore facilities, since the latter pay no taxes ...

For these reasons, I'd be guarded against any heavy commitments, in devices, and would place these lines in the Tariff-Sensitive part of the portfolio. And that implies a heavy emphasis on short-run profitability, positive cash generation, and fast-pay-back projects of modest dimensions.

DISTRICT PLANTS. I view this concept as a line of commerce unto itself, a potentially large one with profit potential, and I would consider it to be in the Canadian market, non-tariff sensitive, part of our portfolio, deserving of strong strategic attention.

Rather than viewing it as a nice adjunct to S & C's business, it may be preferable to view it as S & C's *main* business with all other activities designed to support it.

... *Assemblies* made centrally at the mother plant are of course ambivalent with the concept of district plants, and can engender some of the problems inferent in the old M & R's. Consequently, all assembly work should gravitate into the scattered network of district plants.

All customized assemblies would be done by every plant for their market areas.

Where it is *supportive* of the district functions to have a standard line of assemblies for fast turn around service, or whatever, these could still be decentralized amongst those district plants, so that a district plant might have one of those standard lines in 'building 2', feeding itself and all other district plants.

The only centralized mother facilities would be first, the headquarters operation which would have a facilitative thrust, such as an ASD headquarters and date processing system. The computer network is the principal function that allows decentralization ('economy of specialization') while preserving most of the advantages that were inherent in having things in one place ('economy of scale'). Second, if the business is to be flexible in make/buy and sourcing decisions it may need a place to make devices.

... Strictly speaking this line of reasoning, which is perhaps too skeletal at

this stage, constitutes only a strategic option, which I believe we should evaluate. Concurrent pressures, however, due to the strike, could well compress our evaluation and decision time to shorter than we'd like."

Apart from advising Mr. MacNeil that the strike could result in a forced decision to close S & C Division down, Mr. Tyaack's "skeletal reasoning" contemplates the movement of custom assemblies and standard sub-assemblies out of Hamilton and a centralized building to make devices.

22. As a result of the June workshop it was clear to Mr. MacNeil that there would be no capital investment in the Aberdeen Avenue plant. And, as he testified, if S & C Division was not permitted to spend money on Aberdeen Avenue, the Division would not be able to grow. Any growth would have to take place away from Aberdeen Avenue and by defending his Division he had won a mandate to produce a strategic plan to show how productivity could be increased by moving to smaller plants. Mr. Tyaack stated the problem succinctly: "If S & C Division did not move, we would keep it as a 'cash cow' and add it to the Hamilton disaster list."

23. Under cross-examination Mr. Tyaack related an example of how smaller plants could increase productivity. He personally had been involved with the move of a product line out of a plant in Pittsburgh, Pennsylvania to a new plant, also in Pennsylvania. In the first year productivity doubled. In the second year the new plant was unionized. Over the next nine years productivity increased by a further 50% for a total increase of 150% over 10 years.

24. On or about 21st July, 1978 the new strategic plan for S & C Division was approved by Mr. Tyaack. It proposed that funds be allocated for new plants as follows:

- 1979 – a devices plant in Ontario to produce watthour meters
 - a standard sub-assembly plant in Alberta
- 1980 – a custom assembly plant for Ontario
- 1981 – a custom assembly plant for Quebec-Atlantic provinces
- 1982 – two devices plants for Ontario
- 1983 – one devices plant for Ontario

Mr. MacNeil had been able to identify 4 product groups of devices that qualified for investment under the new "no tariff protection" criteria, – watthour meters, case breakers, controls and relays.

25. Together with what is set out in paragraph 10 of the Alternate Chairman's decision, the new strategic plan contained the following:

(d) *Devices*

Centralized operation to protect make-buy position in meters, relays,

package control and no-fuz breakers. Operated as extension of WEC strategy to optimize Canadian contribution to corporate performance.

Unique Canadian features include:

- CSA Standards
- Francization
- Provincial Purchasing Policies

Meters – Government standards on sealing methods

Relays – 80% of our market specifies unique Canadian requirements

Located in major market area

As I read the above, the strategic plan is saying that there are 4 devices product groups which are worthy of investment because the products have a unique Canadian market. Canadian operations could supply the market just as cheaply as operations in the United States or other countries.

26. More specifically the Board learned that with watthour meters there is import protection because the engineering specifications are unique to this country. Further, as a matter of policy, electric power suppliers would buy only meters that were made in Canada. Mr. Tyaack referred to this protection by “engineering specs” and purchasing policy as having the same effect as tariff protection.

27. In Exhibit 13, one of Mr. MacNeil’s planning books for the preparation of the strategic plan there is the following:

“Utility business provides a welcome exception to the dismal investment picture. . . .

However in cases where WEC products are not suitable for use in Canada or no WEC product is available and an opportunity exists in the Canadian or export market, original product development will be undertaken by S & C utility products.”

28. Following approval of the strategic plan Mr. Tyaack instructed Mr. MacNeil to prepare the financial data to show the return on investment for the new plants. Mr. Tyaack could not approve this type of investment. With his approval an appropriation request would be made to the Major Projects Review Committee of WEC. Mr. Tyaack would not authorize the appropriation request unless the projected return on investment was 15% or better. In late October, 1978 Mr. MacNeil submitted his financial data showing a minimum rate of return of 18% over 10 years based on the premise that the plants would have no value at the end of that period.

29. The content of the appropriation request is set out in paragraphs 10, 11, 12, 13, 14, 15 & 16 of the Alternate Chairman’s decision. The appropriation request summarizes the problems with the Aberdeen Avenue plant and the market weakness of S & C Division’s products. The problem for the Board arises when the request details the intention of WCL

to locate the new plants for devices and standard sub-assemblies at sites chosen to minimize the chances of unionization and to allow the employer to operate what WCL refers to as "management controlled plants" (a concept which the Applicant Union described as paternalism). WCL chose not to locate the new operations on the vacant land in Burlington, but instead to build a watt-hour meter plant in Alliston, a standard sub-assembly plant in Mount Forest, a devices plant in Perth and a custom assembly plant in Toronto.

30. Mr. MacNeil testified that WCL defines a "management controlled plant" as one in which management makes decisions regarding work and job standards manufacturing processes, capital investments and resource allocation, job assignments and staff size without third party or union involvement. He testified that WCL had always attempted to increase productivity at its plants by attempting to do away with what he described as "people dissatisfiers" (e.g. punching a time clock). The Board was referred to the strategic plan drafted in 1975 in which is found the following:

**"KEY STRATEGIC PROGRAM #3
PRODUCTIVITY IMPROVEMENT
THROUGH DEVELOPMENT OF HUMAN RESOURCES,**

Division management recognizes that our greatest strength and potential for growth is in our people power. For that reason we have adopted a strategic goal of meaningful use of human resources.

If implemented as intended, it is our belief that our people will continue to improve their performance and to increase their abilities to contribute to Divisional productivity.

We define our human resources as those aspects of people, both within and without the Division which can be utilized in a positive manner for the benefit of both the Division and the people involved to attaining mutual goals.

The key to this strategy is management's commitment to *involve our people in our business, help our people progress and receive recognition for their efforts, and minimize people dissatisfiers.*"

31. Mr. MacNeil felt that he could increase productivity by 20% by setting up new manufacturing procedures and new personnel procedures that would deal with employee concerns such as job security, fair pay, work environment and fair management treatment. This, he said, would result in more complex duties for the managers of S & C Division. As he put it "Some managers feel more comfortable with a union shop as it means their duties are easier."

32. Mr. Tyaack stated that the management approach at WCL was to improve the quality of working life and remove worker alienation. This approach, he said, requires mutual trust to reach mutual goals – there can be no hidden reasons. He said it was well documented that "if you treat the worker right, he won't want a union."

33. Both Mr. Tyaack and Mr. MacNeil testified that it was the decision of the employ-

ees whether to have a union at the new plants but that if WCL was successful in its approach, the employees would not want a union. They testified that the Burlington site was not chosen because it would give no economy of specialization and it did not meet the site selection criteria used by WCL.

34. Mr. Tyaack listed other reasons for choosing small towns as the plant sites: cost of land, utility and service costs and taxes. In his opinion small plants work better in small towns because of lower worker turnover and the visibility of the plant as a noticeable employer in the town.

35. When asked why different site selection criteria were used for the custom assembly plant (Toronto) than for the standard sub-assembly and devices plants (Alliston, Perth and Mount Forest), Mr. MacNeil and Mr. Tyaack both said that the custom assembly plant was market oriented while the other plants were manufacturing oriented. The custom assembly plant had to be located in the market area so as to respond to customer demands. By its very nature it was not tied to productivity, while the other plants produced standard items and were very dependent on productivity.

36. With Mr. Tyaack's authorization, the appropriation request went to the Major Projects Review Committee and was approved on 15th November, 1978. The investment of \$11 million was approved by the Board of Directors of WEC on 29th November, 1978 and the expenditure by WCL of that amount was approved by its Board of Directors on 12th December, 1978. There is no evidence to indicate that the timing of the decisionmaking process was manipulated by WCL.

37. From May to September, 1978 the Hamilton employees were on strike at the three plants. Their new collective agreement was ratified on 15th September, 1978 and formally signed on 12th December, 1978. Mr. Tyaack stated that, during the period from July to September, "advising the union about strategic plans never occurred to me. You don't advise what you are thinking. The result is uproar."

38. During cross-examination he perceived the relationship of WCL and the Applicant Union between bargaining sessions as being adversarial in nature (a perception confirmed by the Applicant Union when it argued that confrontation was the essence of trade unionism). Between periods of hard bargaining Mr. Tyaack felt that management and the union should work together toward common goals. He related one example where WCL requested that its managers gain experience by working on the shop floor and the union refused the request.

39. In or about March 1979 WCL announced its intention to move the production of wattour meters to Alliston. Production was to start in April 1980. Production at Perth and Mount Forest is scheduled for 1981. Mr. Tyaack testified that the order of the moves is being scheduled over 3 years so that the Hamilton operations could absorb the employees of S & C Division that are being affected. He stated that it was the objective of WCL to provide a job for every person who would otherwise be laid off by the moves.

40. Mr. Tom Davidson, the National Co-ordinator of the Applicant Union, also testified. He described a history of plant moves by WCL in which the bargaining rights of the union were recognized by the company at some of the new locations and not at others. He

stated that if the Applicant Union had known of the plans of S & C Division during negotiations it would have demanded that there be no move by WCL or alternatively, a move to Burlington with bargaining rights to the union at the new location. From information received during bargaining, Mr. Davidson said the Applicant Union calculated the rate of return on investment for 1977 by WCL and its S & C Division as 12% - 13%. He stated that WCL was concerned with the rate of return on its sales during bargaining.

41. Filed with the Board (as Exhibit 53) was a copy of Negotiation News put out by WCL on 23rd March, 1978. It highlights the presentation of the negotiation committee of the Applicant Union by the Treasurer of WCL. It states in part:

“During the last few years the Company has made progress. Last year was a good year. But the Company is ‘only on the road to respectability’ in financial terms. . . .

We are still ‘not there’ as far as respectability is concerned and it will be tough sledding in the light of the business climate for secondary industry . . .

In summary we are looking at another year of relatively weak growth and unfortunately the weakest areas of the economy appear to be those crucial to Westinghouse divisions which sell to the construction and industrial markets. . . .

In the somewhat longer-term, secondary industry in Canada is seriously exposed. ‘Companies like ours must re-think their charters and strategies – if we are to continue to serve the domestic market’ and we must identify products that we can handle from the ground up in world markets – as with turbines.”

UNFAIR LABOUR PRACTICE

42. The Applicant union alleges that WCL has committed an unfair labour practice by contravening sections 56 and 58(a)(b) and (c) of the Act. In essence the Applicant Union alleges that this is a case of a “runaway plant” and that WCL is moving S & C Division out of Hamilton in order to avoid its duties and obligations under its collective agreement with the union and its obligations to the union and its employees under the Act.

43. Because the closing of a business operation is at issue, section 68 of the Act must be considered. That section provides:

“Nothing in this Act prohibits any suspension or discontinuance for cause of an employer’s operations or the quitting of employment for cause if the suspension, discontinuance or quitting does not constitute a lock-out or strike.”
(emphasis added)

The wording of section 68 was originally found as a regulation to the Act at its inception. Subsequently it was incorporated into the Act.

44. A union is entitled to invoke the remedies of the Act with respect to plant closings if it can show that:

- (a) the employer did not have cause to discontinue the operations;
OR
- (b) the discontinuance by the employer constitutes a lock-out.

Previous cases of this Board (*Webster & Horsefall* [1969] OLRB Rep. Sept, 789; *Humpty-Dumpty* [1977] OLRB Rep. July 401; *Inglis Ltd.* [1977] OLRB Rep. March 128; *Academy of Medicine* [1977] OLRB Rep. Dec. 783) clearly set out that an employer must have valid business reasons to close an operation. These cases are all *ad idem* on the requirements under section 68 of the Act and in none of them is the “taint theory” (as first espoused by the Board in *The Barry Examiner* case [1975] OLRB Rep. Oct. 745) mentioned. In all these cases the Board found (a) a lockout; (b) no “cause” for the closure other than a desire by the employer to evade its responsibilities under the Act; or (c) valid business reasons for the discontinuance and no offence under the Act.

45. Both WCL and the Applicant Union agree that the test under section 68 is one of “preponderant motive.” The company argues that the reason for the closure is devoid of anti-union animus or, in the alternative, economic reasons are the predominant motive. The company relies on the words of Viscount Simon L.C. in the case of *Crafter Hand Woven Harris Tweed Co. Ltd. v. Veitch* [1942], All E.R. 142 at page 149 where he states:

“The analysis of human impulses soon leads us into the quagmire of mixed motives, and, even if we avoid the word ‘motive’, there may be more than a single purpose or object. It is enough to say that, if there is more than one purpose actuating a combination, liability must depend on ascertaining the predominant purpose. If that predominant purpose is to damage another person and damage results, that is tortious conspiracy.”

and on the words of this Board in *Webster & Horsfall* supra:

“We are of the opinion that the right to strike is so fundamental to the scheme of collective bargaining propounded by the Labour Relations Act that activities or conduct destructive to that right cannot be justified by reasons devoid of legitimate business purpose or lacking in significant business purpose.”

The company argues that the words “by reason devoid of legitimate business purpose or lacking in significant business purpose” show that the Board was using the preponderant motive test. The company further argues that in the *Academy of Medicine* case, supra, the Board reiterated the preponderant motive test: (Paragraph 39)

“It is against this background that the closure of the Call Answering Service must be examined. The question is whether the closure of the Call Answering Service represents a continuation of the (employer’s) anti-union activity or whether it can be justified on business grounds.”

46. The Applicant argues that the evidence discloses that WCL had a mix of motives for closing the operations. Some were economic, but the preponderant motive was to escape its obligations to the union and its employees in contravention of the Act.

47. I agree with counsel for the parties that the test in ascertaining “cause” within the memory of section 68 is one of predominant motive. If the “taint theory” was taken as the test it would add a qualification to section 68 that would make the section meaningless. Paraphrasing section 68 to incorporate the effect of the taint theory would give this result:

“No unfair labour practice prohibits any suspension or discontinuance for cause (provided such cause shall not include an unfair labour practice) of an employer’s operations . . .”

If the “taint theory” applied to the issue of “cause” as found in section 68, it is difficult to conceive why the Legislature found it necessary to include “lockout” as a specific exclusion to the section.

48. In my opinion section 68 allows an employer to make *bona fide* investment decisions without fear that its actions are in breach of the Act. The Board must determine if these are valid business reasons for an employer to close down an operation. Once having determined these reasons the Board must decide if they substantiate the decision to close. If the reasons are such as would allow any employer to shut down the operation in the same circumstances then “cause” has been established under section 68 and the employer in question is protected from allegations that it is in breach of the Act.

49. From the evidence WCL had the following reasons for moving units of S & C Division out of the Aberdeen Avenue plant:

- (a) the plant was old, outmoded and had significant transportation, access and parking problems;
- (b) the cost of renovating the plant would equal the cost of new facilities;
- (c) even with renovation the plant operations would not be amenable to “economy of scale” savings, so as to increase productivity;
- (d) no capital investment on a “sunk-cost” basis has been allowed on the Aberdeen Avenue plant since 1975. The facilities were crowded and there would be no future growth for S & C Division without such investment;
- (e) tariff removals forced the corporate strategy of WCL to change from that of “branch plant” economies to that of investing only in product lines that would pay their way without tariff protection;
- (f) S & C Division would have to increase productivity in order to survive and it could only do that by leaving the Aberdeen Avenue plant; and
- (g) the success or district plants indicated that smaller operations could work to solve the problems of S & C Division.

All of these factors had been identified by WCL in June of 1978. Characterizing the problem

as a “factory problem” the information used by WCL to identify it made no attempt to carve out responsibility or pin blame on the Applicant Union or the collective agreement. The information WCL used was blind to animus. By June of 1978 it was recognized that S & C Division could only survive by leaving the Aberdeen Avenue plant, and it is clear that WCL had valid substantial business reasons for arriving at that conclusion. In fact, the evidence would indicate that WCL would be better served by closing out the Aberdeen Avenue plant as soon as possible rather than scheduling the various moves over 3 years.

50. In June, 1978 Mr. Tyaack’s memorandum to Mr. MacNeil authorizes planning for the move of custom assemblies and standard sub-assemblies from the plant. Mr. MacNeil is able to identify 4 product groups of devices that would also qualify under the new investment criteria. It is evident from the memorandum that the move out of Aberdeen Avenue is economic. Having made the decision that units of S & C Division would have to leave Aberdeen Avenue in order to survive and grow, and with the decision based on economic information that contains no hint of anti-union motive, WCL has established “cause” within the meaning of section 68 of the Act. Stated in the negative, it is a determination not to invest further money for S & C Division at Aberdeen Avenue. What follows from that stage is a determination of whether S & C Division is worthy of further new capital investment of some \$11 million at new plant sites.

51. There is no evidence that non-union plants were a factor in the decision to write Aberdeen Avenue off as a lost cause. There is no evidence of previous anti-union activity on the part of WCL; in fact the evidence is to the opposite effect. Having established valid “cause” for closing operations at Aberdeen, WCL is free to go where it wants and choose its new plant sites using any selection criteria that it wishes. It is noteworthy that the same site selection criteria are used for the standard sub-assembly plant (which move is mentioned in Mr. Tyaack’s memorandum of 14th June, 1978) as for the devices plants (for which Mr. Tyaack saw no future in his memo).

52. The criteria used by WCL to select new sites leave no doubt that WCL prefers not to have a union at its new plants, but that is not an offence under the Act. The likelihood of reducing the chances of union organization does not contravene the Act. Likewise the stated objective of managing its plants so the employees will not want a union, is not an offence.

53. I am satisfied that WCL has not violated sections 56 and 58 of the Act.

THE DUTY TO BARGAIN

54. The effective decision to move S & C Division out of Hamilton was made in late November when the Board of Directors of WEC voted to invest \$11 million in new facilities for the Division in Ontario. In considering whether WCL was obligated to advise the Applicant Union of its plans to move the Division from Hamilton it is worthwhile to summarize the steps leading up to the final decision:

- (1) March, 1978 – S A C Division is advised that there will be no new investment for products that are tariff and technology sensitive;
- (2) June, 1978 – Mr. MacNeil persuades Mr. Tyaack that there are el-

ements of S & C Division's product line that can qualify for future investment. Both are in agreement that productivity can be increased and costs reduced only by a move from the Aberdeen Avenue plant;

- (3) July 21, 1978 – Mr. MacNeil receives approval of the new strategic plan for S & C Division for 1979-1983. He is then instructed by Mr. Tyaack to prepare the necessary request for appropriation. The financial data must show a return on investment of at least 15% or Mr. Tyaack will not allow the request to be submitted to the Major Products Review Committee of WEC. Mr. Tyaack has advised Mr. MacNeil to work quickly as the strike may cause WEC to decide to close the Division;
- (4) Late October, 1978 – the appropriation request is approved by Mr. Tyaack.
- (5) November 15, 1979 – the appropriation request is approved by the Major Projects Review Committee of WEC.
- (6) November 29, 1978 – the Board of Directors of WEC approved the investment.

55. Since a new collective agreement was ratified on 15th September, 1978, the question becomes: Was WCL under a duty to advise the Applicant Union of the content of the strategic plan of S & C Division from and after 21st July, 1978? Put another way, was WCL obligated to advise the union before the Board of Directors of WEC made its economic decision?

56. The Applicant Union has represented the employees in Hamilton since 1945 and has watched $\frac{2}{3}$ of the operations of WCL in that city close down or move. On at least two occasions during bargaining the Applicant Union sought to expand the recognition clause in the collective agreement. On one occasion the Applicant Union sought to protect the Hamilton employees from the effects of contracting in or contracting out of work by WCL. The recognition clause of the collective agreement is limited to the specific address of WCL's plants in Hamilton. Other than their plant-wide seniority, the Applicant Union must have been aware that the employees had no further protection against the effects of future plant closings. In 1975 the Applicant Union was put on notice that WCL wanted to move S & C Division out of the Aberdeen Avenue plant. Even with a move to Burlington the collective agreement would not apply at that location.

57. Nevertheless, during the negotiations in 1978 the Applicant Union did not seek any protection from the employees. It never asked WCL if there were any actions being contemplated which would have a significant impact on the Hamilton employees. Not only did it fail to raise the matter, it proposed the renewal of article 3.01(b) of the expired agreement giving WCL the unilateral right to determine the number and location of its plants. In these circumstances the union's position may be seen as an acknowledgment of the right of WCL to locate its plants and a waiver by the union of any claim to participate with respect to any decision by WCL to re-locate a plant. It is also noteworthy that the Applicant Union did not

file its section 14 complaint until after the issue had been raised by the Alternate Chairman during the first day of hearing.

58. The Applicant Union was not misled in any way by WCL. It was aware of the physical situation at the Aberdeen Avenue plant and of WCL's desire to move S & C Division from the site. It was put at no disadvantage in that it could not formulate proposals to protect its members because of a lack of information. In this case mere silence is not bargaining in bad faith when WCL has the stated right to re-locate its plants and the union has proposed the same right for WCL in the new collective agreement. The re-location was unrelated to the strike and there was no obligation on WCL to advise the Applicant Union of a closure because of the strike.

59. In my opinion there is no obligation on an employer to reveal potential business decisions that may never happen, and especially where, as in this case, the employer had not compiled or analyzed the financial data relative to the decision. The effect on collective bargaining of such an obligation would be delay, suspicion and, probably, allegations against the employer of bargaining in bad faith. The evidence is that the strategic plans of S & C Division could in no way be viewed as anything more than a calculated projection of what might come to pass, (one need only recall the cancelled move to Burlington in 1975 or the failure of the plan in 1976 for a new Ontario district plant).

60. To obligate an employer to bargain before a final decision has been made is to say that the employer is not free to make the decision. The decision whether to continue or close down a plant is the prerogative of the employer whether or not such fact is expressly stated in a collective agreement. The prerogative disappears when the employer is forced to bargain before the decision making process is complete. I can state it no better than in the words of the National Labour Relations Board of the United States in the case of *General Motors Corp.* 191 N.L.R.B. No. 149. In that case a union was alleging that an employer had broken the law in failing to bargain about its decision to sell its business prior to the actual sale. That Board said:

“We believe, however, that this issue is controlled by the rationale the courts have generally adopted in closely related cases, that decisions such as this, in which a significant investment or withdrawal of capital will effect the scope and ultimate direction of an enterprise are matters essentially financial and managerial in nature. They thus lie at the very core of entrepreneurial control, and are not the types of subjects which Congress intended to encompass within ‘rates of pay, wages, hours of employment, or other conditions of employment’.”

61. In my opinion the Legislature of this Province never intended or contemplated that matters which are “at the very core of entrepreneurial control” should be subject to mandatory bargaining within section 14 of *The Labour Relations Act*.

62. With the Applicant Union having failed to raise the issue and WCL not having made a final decision during the course of bargaining there is no breach of duty by WCL under section 14 of the Act.

LOCKOUT AND BREACH OF THE COLLECTIVE AGREEMENT

63. I agree with the decision of the Alternate Chairman with respect to his dismissal of the charges that WCL is in breach of the collective agreement and that WCL has locked out its employees illegally. I do not agree with the remedies imposed because of the stated intention of WCL that no employee will lose his or her job as a result of the relocation. If WCL had no "cause" to move its operations from Hamilton then the reasons in the Board's case of *Humpty Dumpty supra*, would indicate that WCL should be ordered not to move S & C Division out of Aberdeen Avenue.

64. I conclude with the reflection that these proceedings could have been avoided if the Applicant Union had taken the simple and obvious protective steps at the bargaining table. It need only have asked WCL if there were any plans to move any operations out of the Hamilton plants.

65. The comments of Professor P. Weiler, given approval by the Board in the *Inglis Ltd.* case, *supra*, are again worthy of consideration. The Board said at paragraph 20 of that decision:

"The Board practice is to certify an applicant trade union, which evidences sufficient membership support, for all employees of the employer within a named municipality. The municipality boundary has been the rough and pragmatic response of the Board to the conflict generated by the desirability for continuity of bargaining rights on the one hand [i.e. when a plant relocates] and the requirement for freedom of choice on the other. The fine-tuning is left to the parties. Whereas the certificate establishes the initial scope of the union jurisdiction the parties are free to negotiate an expanded recognition [subject to the statutory protection afforded those covered by a voluntary recognition]. It is the parties themselves who are best equipped to make the necessary trade-offs between management rights, union rights and employee rights. It is they who are best equipped to make their own bargain and to thereby set the parameters of their own relationship."

The Board went on to emphasize some of the remarks of Professor Weiler found in an article entitled "The Role of the Arbitrator", University of Toronto Law Journal Vol. XIX No. 1, 1969 at page 16. Part of the remarks read as follows:

"... The classic example of this issue we have already discussed, the conflict between management rights and job security in the context of subcontracting, technological change, work assignment, relocation, etc. *In effect, these are issues which are eminently bargainable, issues which can find no more objective criteria for resolution than relative bargaining strength as finally implemented in an armistice line which defines the boundary between 'unilateral managerial discretion' and 'employee job security.'* As of these it is improper to say there is a common purpose, first because as a matter of empirical fact it is not so and, secondly because the whole logic of development of collective bargaining establishes these issues as the problems for which collective negotiation and agreement is designed to deal....

This institution of arbitration is functionally unsuited to the disposition of this type of problem because it is incapable of solution even by a creative elaboration of law. *The decision of when and how to change the armistice line between management function and union control is one which itself cannot be subject to law, any more than can the decision of when to legislate.*"

PARTIAL DISSENT OF BOARD MEMBER W.F. RUTHERFORD.

1. There is no need for me to recite the evidence. The evidence has been extensively and accurately summarized in the decision of the Alternate Chairman.
2. I concur with the legal analysis and the findings of the Alternate Chairman as related to anti-union motive. While I agree that the decision to relocate need only have been tainted by anti-union motive to be in violation of *The Labour Relations Act*, the predominant motive of the company in this case was to escape the trade union. But for the existence of the union in Hamilton the company would not have vacated its Hamilton premises. In the mind of the company the union stood in the way of an improved return on investment; a return on investment which the company intended to make at the expense of its employees. The union, as the legal bargaining agent of the company's employees in Hamilton, had been forced to strike on a number of occasions to improve terms and conditions of employment. This company sought to wipe out these gains and to operate without interference and without threat of strike in the future by moving its plant outside the union's recognition. The company saw plant relocation as the means to accomplish this objective and its decision was made all the easier because it had allowed the Hamilton plant to run down. The company was prepared to remain in Hamilton until it decided that it should operate union free. It then hid its real motive behind the guise of unsatisfactory premises.
3. The company was not content to move its operation to Burlington where its existing employees could have continued in its employ with little disruption to their home life. Proximity to markets does not apply to devices and standard sub assemblies; the company owned land in Burlington and could have maintained its work force. In order to minimize the risk of having its employees bring the union with them the company chose to locate where its employees would have to suffer major disruption to their home life and incur major expenses if they wished to follow their jobs. We heard evidence that the Hamilton plant had a 10 year life expectancy with no investment. If even a part of the \$11 million invested in the new plants had been put back into the Hamilton plant its life could have been extended well beyond 10 years; but the company would still have had to deal with the trade union in Hamilton and could not have made the additional profits which it hoped to make by operating without a union, and so it did not consider investing in Hamilton. Mr. MacNeil made it clear that the only way the company could increase its profits to the desired level was to vacate Hamilton and leave its unionized employees behind. One only has to read the document asking for approval to relocate to comprehend that the decision was based on the gains to be made from leaving the union and its members behind. *The Labour Relations Act* protects employees from this type of callous anti-union employer behaviour.
4. I disagree with the finding of the Alternate Chairman that there was no violation of the duty to bargain in good faith and his reasons. This company was planning to leave Hamilton throughout the period of the strike. Mr. MacNeil admitted that the company was

proceeding as if approval would be given. The decision was then announced at a time when the union could do nothing to alter the decision or minimize its disastrous effects. I cannot accept that a company which had reached the stage in its planning which this company had reached during the bargaining process could remain silent and not be in violation of the duty to bargain in good faith. Surely a company which is proceeding as if it will be relocating 600 jobs beyond the union's jurisdiction is obligated to inform the trade union during bargaining so that the trade union can bargain a response. The company did not reveal its intentions because its intention was to run away from the union. The company was not interested in seeking concessions from the union or in having the union bargain about the effects of the relocation of its members. Even if it had revealed its intentions this company with its 12 per cent return on investment would have been hard pressed to make a case for economic hardship. In my opinion, this company misrepresented itself when it negotiated the current collective agreement and therefore it violated section 14 of the Act.

5. I disagree with the decision of the Alternate Chairman that there has not been a lockout. The company officials were upset with the exercise of the right to strike by its Hamilton employees – all of them – and contemplated that the S & C employees would bump into jobs elsewhere in Hamilton when S & C relocated. The decision to relocate was made for anti-union reasons and during the 1978 strike. I would have inferred that the decision to relocate S & C, with the planned bumping of S & C employees into the other divisions was also designed to intimidate the employees of the other divisions who had exercised their right to strike in the past. I would have found, therefore, that the company's actions were an unlawful lockout under the Act.

6. On balance I agree with the decision of the Alternate Chairman not to order the company back to Hamilton. Without the investment in these facilities sought by Mr. MacNeil in January, 1978 and without the power to order the company to invest, I can see the company running these facilities into the ground and then making another attempt to run away from the union. I agree that the employees have to be given "meaningful" access to their jobs and the order of the Board accomplishes this as best it can be accomplished. I disagree with the decision of the Alternate Chairman not to extend the collective agreement and the union's bargaining rights to the new locations. The persons hired at the new locations would not have jobs but for the unlawful decision of the company to relocate. I would not have been prepared to give these persons and the company the degree of consideration given by the Alternate Chairman in his decision not to extend the agreement and the union's bargaining rights. The company's breach of the Act is one of the most serious to come before the Board and in response I would have extended the collective agreement and with it the union's bargaining rights to the new locations.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1980

BARGAINING AGENTS CERTIFIED DURING MARCH

No Vote Conducted

1704-78-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers (Applicant) v. Crawford Sand and Gravel Co., Superior Sand and Gravel Co., (Respondents).

Unit: "all dump truck owner-operators who provide haulage services to the respondent at Maple, Ontario." (35 employees in the unit). (*Having regard to the agreement of the parties*).

0230-79-R: Ontario Public Service Employees Union (Applicant) v. The Timmins Association for the Mentally Retarded (Respondent).

Unit #1: "all employees of the respondent in Timmins, save and except Executive Director, the Confidential Secretary-Bookkeeper, Director of ARC Industries, Director of Accommodation, foreman, persons above the rank of foreman, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (21 employees in the unit). (*In conformity with the agreement of the parties*).

Unit #2: "all employees of the respondent in Timmins regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except Executive Director, the Confidential Secretary-Bookkeeper, Director of ARC Industries, Director of Accommodation, foreman and persons above the rank of foreman." (3 employees in the unit). (*In conformity with the agreement of the parties*).

0728-79-R: Pharmacists and Professional Employees Association, Local 1976, chartered by the Retail Clerks International Union, C.L.C.-C.I.O.-A.F.L., (Applicant) v. The Regional Municipality of Haldimand-Norfolk (Grandview Lodge) (Respondent).

Unit #1: "all employees of the respondent in Dunnville, Ontario, save and except director of nursing, department heads, persons above the rank of department head, professional medical staff, registered nurses, office and clerical staff, barber, hairdresser, social services workers, persons regularly employed during the school vacation period." (42 employees in the unit).

Unit #2: "all employees of the respondent in Dunnville, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except director of nursing, department heads, persons above the rank of department head, professional staff, registered nurses, office and clerical staff, barber, hairdresser and social services worker." (40 employees in the unit). (*clarity note*).

Unit #3: "all registered nurses regularly employed by the respondent in Dunnville, Ontario save and except director of nursing, department heads and persons above the rank of director of nursing or department head, and nurses regularly employed for not more than 24 hours per week." (4 employees in the unit).

Unit #4: "all registered nurses regularly employed by the respondent in Dunnville, Ontario for not

more than 24 hours per week save and except director of nursing, department heads and persons above the rank of nursing or department head." (5 employees in the unit). (*See Application for Certification Dismissed – No Vote Conducted*).

1121-79-R: Ontario Nurses' Association (Applicant) v. Ontario Cancer Treatment & Research Foundation Thunder Bay Clinic (Respondent).

Unit: "all registered and graduate nurses employed by the Ontario Cancer Treatment and Research Foundation, Thunder Bay Clinic, in the City of Thunder Bay, engaged in a nursing capacity, save and except supervisors and persons above the rank of supervisor." (5 employees in the unit).

1682-79-R: The Canadian Union of Public Employees, (Applicant) v. Chapleau Senior Services Incorporated (Respondent) v. Employee (Objector).

Unit: "all employees of the respondent employed at Cedar Grove Lodge, Chapleau, Ontario, save and except Administrator, persons above the rank of administrator and secretary to the administrator." (16 employees in the unit). (*Having regard to the agreement of the parties*).

1767-79-R: Pharmacists and Professional Employees Association Local 1976 chartered by the Retail Clerks International Union, C.L.C.-C.I.O.-A.F.L., (Applicant) v. Picton Manor Nursing Home (Respondent) v. Employee (Objector).

Unit #1: "all employees of the respondent at Picton, Ontario, save and except supervisors, (Registered Nurses), persons above the rank of supervisor, office staff, activities director, dietary supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (46 employees in the unit). (*Having regard to the agreement of the parties*). (*Bargaining Unit #2 – See Application for Certification Withdrawn*).

1793-79-R: Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC, (Applicant) v. Kayser-Roth Canada Limited, (Respondent).

Unit: "all employees of the respondent at Kitchener, Ontario, save and except department heads and supervisors, persons above the rank of department head and supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (45 employees in the unit). (*Having regard to the agreement of the parties*).

1808-79-R: Canadian Union of Public Employees (Applicant) v. Ottawa Roman Catholic Separate School Board (Respondent).

Unit: "all office, clerical and technical employees of the respondent save and except Supervisors, persons above the rank of Supervisors, Personnel Department employees, Accountant, Paymaster, Budget Officer, Secretaries to the Director of Education and Secretary, Secretary to the Superintendent of Business Finance and Treasurer, Secretary to the Assistant-Secretary of the Board, Secretary to the Superintendent of English schools, Secretary to the Superintendent of French schools, Secretary to the Chief Accountant, persons regularly employed for not more than 24 hours per week and students employed during the summer school vacation period, and persons covered under subsisting collective agreements." (109 employees in the unit). (*Having regard to the agreement of the parties*).

1849-79-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. The Corporation of the Township of Gosfield South (Respondent).

Unit: “all employees of the respondent working in the Township of Gosfield South, save and except the administrator, those above the rank of administrator, the deputy clerk treasurer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

1851-79-R: Office & Professional Employees International Union (Applicant) v. West Fort William Credit Union Ltd., (Respondent).

Unit #1: “all office, technical and clerical employees of the respondent in Thunder Bay, save and except custodian, confidential secretary to the manager, manager trainees, supervisor, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (26 employees in the unit). (*Having regard to the agreement of the parties*). (*Bargaining Unit #2 – See Application Certified Subsequent to Post-Hearing Vote*).

1895-79-R: Labourers’ International Union of North America, Local 527, (Applicant) v. The Dale Corporation (Respondent).

Unit: “all employees of the respondent working at 1375, 1401-1405 and 1435 Prince of Wales Drive, Ottawa, save and except maintenance superintendent and property managers, persons above the rank of maintenance superintendent and property manager, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

1954-79-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada Local 666, (Applicant) v. W. H. Wiltshire Plumbing & Heating Ltd., (Respondent).

Unit: “all plumbers and plumbers’ apprentices in the employ of the respondent in the Regional Municipality of Niagara and the County of Haldimand, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in the unit).

1970-79-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Corporate Foods Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at its plant at 35 Rakely Crescent, Etobicoke, in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (34 employees in the unit). (*Clarity note*).

1974-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Jutras Die Casting Limited (Respondent).

Unit: “all employees of the respondent in Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (67 employees in the unit). (*Having regard to the agreement of the parties*).

2006-79-R: Communications Workers of Canada (C.L.C.), (Applicant) v. Seaway Credits Limited – carrying on business as Tel-Air Systems (Respondent).

Unit #1: "all employees of the respondent engaged in telephone answering and radio paging in the City of Oshawa, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in the unit).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week, and students employed during the school vacation period, who are engaged in telephone answering and radio paging in the City of Oshawa, save and except supervisors and persons above the rank of supervisor." (5 employees in the unit).

2035-79-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304 (Applicant) v. Fortier Beverages Ltd., (Respondent).

Unit: "all employees of the respondent at New Liskeard, Ontario, save and except supervisors, persons above the rank of supervisor, sales manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (7 employees in the unit). (*Having regard to the agreement of the parties*).

2036-79-R: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304 (Applicant) v. Fortier Beverages Ltd., (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Timmins, Ontario, save and except supervisors, persons above the rank of supervisor, sales manager, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (8 employees in the unit). (*Having regard to the agreement of the parties*).

2042-79-R: International Molders & Allied Workers Union (Applicant) v. Canadian Recycling Laboratories Inc., (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent at Niagara Falls, Ontario, save and except foremen, persons above the rank of foremen, office and sales staff, sales and service technicians and silver control specialist." (23 employees in the unit). (*Having regard to the agreement of the parties*).

2044-79-R: Office and Professional Employees International Union (Applicant) v. Toronto Steel Workers Credit Union Limited (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto." (2 employees in the unit). (*Having regard therefore, to the agreement of the parties*).

2051-79-R: United Steelworkers of America (Applicant) v. The Steel Company of Canada, Limited, Lake Erie Development (Respondent).

Unit: "all employees of the respondent at its Lake Erie Development in Haldimand-Norfolk Region, save and except foremen and persons above the rank of foreman, office, clerical and technical sales personnel and security guards." (449 employees in the unit). (*Having regard to the agreement of the parties*).

2084-79-R: Canadian Union of Public Employees (Applicant) v. Northumberland Newcastle Board of Education (Respondent).

Unit: "all employees of the respondent in the County of Northumberland and the Town of Newcastle regularly employed for not more than 24 hours per week, engaged in maintenance, services and plant

operations save and except supervisors, foremen, persons above the rank of supervisor and foreman, office staff and persons covered by a subsisting collective agreement between the respondent and the Canadian Union of Public Employees, Local 1206.” (30 employees in the unit).

2085-79-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Kirkland Lake, (Respondent).

Unit: “all employees of the Respondent in Kirkland Lake, Ontario, employed in the Parks and Recreation Department save and except Superintendents, those above the rank of Superintendent, Secretary to Director, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and those persons covered by subsisting collective agreements.” (44 employees in the unit). (*Having regard to the agreement of the parties*).

2094-79-R: Canadian Chemical Workers’ Union (Applicant) v. Canada Sand Papers Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all office and clerical employees of the respondent at Plattsville, Ontario, save and except technicians, salespersons, supervisors, those above the rank of supervisor, the personnel clerk and the secretary to the manager of operations.” (34 employees in the unit). (*Having regard to the agreement of the parties*).

2106-79-R: Association of Professional Student Services Personnel (Applicant) v. The Board of Education for the City of North York (Respondent).

Unit: “all full-time multicultural community workers, speech therapists, and speech pathologists employed by the respondent in the Municipality of Metropolitan Toronto, save and except employees of the respondent employed in a confidential or managerial capacity.” (4 employees in the unit). (*Having regard to the particular circumstances of this case, the history of the collective bargaining between the parties and the agreement of the parties*).

2122-79-R: United Steelworkers of America (Applicant) v. North American Fabricators Ltd., (Respondent).

Unit: “all employees of the respondent in Aurora, save and except foremen, persons above the rank of foreman, office and sales staff.” (17 employees in the unit).

2128-79-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 91, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Inter-City Bandag (Ontario) Ltd., (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent working at Kingston, Ontario, save and except foreman, persons above the rank of foreman, students employed during the school vacation period, office and sales staff.” (12 employees in the unit).

2134-79-R: Labourers’ International Union of North America, Local 506, (Applicant) v. Traugott Construction Limited (Respondent).

Unit: “all construction labourers in the employ of the respondent in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman.” (9 employees in the unit).

2148-79-R: Ontario Taxi Association 1688 C.L.C., (Applicant) v. Cyrville Taxi Co., (Respondent)

Unit: "all employees of Cyrville Taxi Co., save and except foremen, those above the rank of foreman and persons regularly employed for not more than 24 hours per week." (10 employees in the unit).

2149-79-R: Service Employees Union, Local 204 AFL-CIO-CLC., (Applicant) v. Doral Construction Limited (Respondent).

Unit: "all employees of the respondent employed at The Seaway Mall in Welland, save and except supervisors, persons above the rank of supervisor, office staff and persons regularly employed for not more than 24 hours per week." (6 employees in the unit). (*Having regard to the agreement of the parties*).

2151-79-R: Service Employees Union, Local 478, A.F. of L. C.I.O., C.L.C. (Applicant) v. Kirkland and District Hospital (Respondent) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of the respondent at Kirkland Lake, save and except the secretary to the administrator, secretary to the assistant administrator, secretary to the director of nursing, secretary to the director of personnel, supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and employees covered by subsisting collective agreements between the applicant and the respondent which became effective on April 1, 1979." (22 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

2154-79-R: National Union of Independent Gas Workers, (Applicant) v. Shorgas Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all appliance sales representatives and salesmen working in and out of Metropolitan Toronto employed by Shorgas Limited, save and except supervisors." (15 employees in the unit).

2157-79-R: Canadian Union of Public Employees (Applicant) v. The Board of Governors of the University of Western Ontario (Respondent).

Unit: "all employees of the respondent at its London campus in the Physical Plant Department engaged in the maintenance and service of buildings and grounds, save and except foremen and foreladies, those above the rank of foreman and forelady, office staff, operating engineers, security guards, students employed during the school or university vacation period and persons regularly employed for not more than twenty-four hours per week." (348 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

2159-79-R: Canadian Union of Public Employees (Applicant) v. Humewood House Association (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto, save and except Executive Director, Secretary to the Executive Director, Residential Co-ordinator, Secretary of Community Programmes, Co-ordinator of Community Programmes, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in the unit). (*Having regard to the representations of the parties*).

2166-79-R: International Union of Electrical, Radio and Machine Workers (Applicant) v. Canadian General Electric Company Ltd., (Respondent).

Unit: "all office and clerical employees, including draftsmen of the respondent Company employed at 1199 Lansdowne Avenue in the Municipality of Metropolitan Toronto, save and except supervi-

sors, persons above the rank of supervisor, specialists, sales staff and confidential secretary to the plant manager.” (10 employees in the unit). (*Having regard to the agreement of the parties*).

2168-79-R: Office and Professional Employees International Union (Applicant) v. Retail Clerks Union, Local 206, Chartered by the United Food & Commercial Workers International Union (Respondent).

Unit: “all employees of the respondent working at and out of Kitchener, Ontario, save and except office and clerical staff, Secretary-Treasurer, President and persons above those ranks.” (5 employees in the unit). (*Having regard to the agreement of the parties*).

2169-79-R: United Steelworkers of America (Applicant) v. Jarvis Clark Company Limited (Respondent).

Unit: “all employees of the respondent at 1038 Elisabetha Street, Sudbury, repair and rebuild shop employees only, save and except foremen, supervisors, persons above the rank of foreman and supervisor, office and clerical staff, sales staff, service staff, employees regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (28 employees in the unit). (*Having regard to the agreement of the parties*).

2176-79-R: Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC, (Applicant) v. Jolly Jumper Inc., (Respondent).

Unit: “all employees of the respondent at its plant in Cambridge, save and except foremen, foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed for the summer vacation period.” (32 employees in the unit). (*Having regard to the agreement of the parties*).

2177-79-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Hamilton (Respondent).

Unit: “all employees of the respondent at Dundurn Castle in Hamilton, Ontario, save and except head guide and persons above the rank of head guide.” (22 employees in the unit). (*Having regard to the agreement of the parties*).

2179-79-R: Sault Ste. Marie Typographical Union No. 746 (ITU), (Applicant) v. The Sault Star – A Division of Southan Inc., (Respondent).

Unit: “all employees of the respondent employed in Sault Ste. Marie, Ontario, in the proofreading department, save and except the supervisor of proofreaders, persons above the rank of proofreader, persons employed for not more than 24 hours per week and students employed during the school vacation period.” (8 employees in the unit). (*Having regard to the agreement of the parties*).

2192-79-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Riverside Hospital of Ottawa (Respondent) v. Ontario Public Service Employees Union (Intervener #1) v. Ontario Nurses’ Association (Intervener #2) v. Association of Allied Health Professionals: Ontario v. Group of Employees (Objectors).

Unit: “all employees of the Riverside Hospital of Ottawa, save and except professional medical staff, registered and graduate nurses, paramedical employees, office and clerical staff, supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements”. (219 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

2199-79-R: Ready Mix Building Supply, Hydro and Construction Drivers, Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Maio Excavators Ltd., (Respondent).

Unit: "all dependent contractors employed by the respondent as truck drivers in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario." (2 employees in the unit).

2202-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.S.W.), (Applicant) v. Stewart-Warner Corporation of Canada Limited (Respondent) v. Office Employees Association (Intervener) v. Group of Employees (Objectors).

Unit: "all office and clerical employees of the respondent at Belleville save and except supervisors and assistant managers, persons above the rank of supervisor and assistant manager, salesmen and Sales Coordinator/Production Planner, Professional Engineers, Chief Accountant, Service and Customer Relations Coordinator, Assistant Purchasing Agent, secretary to Controller, secretary to Marketing Manager, secretary to Manager of Manufacturing, secretary to Chief Executive Officer, secretary to General Manager, high school students employed in cooperative training programs and persons covered by the subsisting collective agreement between the respondent and U.A.W. Local 1538." (16 employees in the unit). (*Having regard to the agreement of the parties*).

2205-79-R: Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Applicant) v. Weston Bakeries Limited (Respondent).

Unit: "all employees of the respondent at its London, Ontario, branch, save and except route foremen, persons above the rank of route foreman, office staff, employees who regularly work 24 hours per week or less and students hired for the school vacation period." (21 employees in the unit). (*Having regard to the agreement of the parties*).

2208-79-R: Canadian Union of Heavy Haulers and Maintenance Workers (Applicant) v. Sure-Way Transport Ltd., (Respondent).

Unit: "all employees of the respondent working in and out of its location in Mississauga, save and except foremen, persons above the rank of foreman, office and sales staff." (52 employees in the unit). (*Having regard to the representations of the parties*).

2221-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W. (Applicant) v. 392354 ONTARIO LIMITED carrying on business as Canadian Machine Tool Electricians (Respondent).

Unit: "all employees of the respondent in Windsor, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons employed for less than 24 hours per week and students employed during the school vacation period." (17 employees in the unit.). (*Having regard to the agreement of the parties*).

2224-79-R: United Rubber, Cork, Linoleum and Plastic Workers of America AFL-CIO CLC, (Applicant) v. Melo Industries (Respondent).

Unit: "all employees of the respondent at its plant in Ajax, save and except foremen and foreladies, persons above the rank of foreman and forelady, office and sales staff." (11 employees in the unit). (*Having regard to the agreement of the parties*).

2232-79-R: Pharmacists and Professional Employees Association, Local Union 1976 Chartered by Retail Clerks International Union, CLC, AFL-CIO, (Applicant) v. Hyde Park Nursing Home (Respondent).

Unit #1: "all employees of the respondent at Guelph, Ontario, save and except supervisors, persons above the rank of supervisor, registered nurses, office staff, registered physiotherapists, registered occupational therapists, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (26 employees in the unit).

Unit #2: "all employees of the respondent at Guelph, Ontario, regularly employed for not more than 24 hours per week save and except supervisors, persons above the rank of supervisor, registered nurses, office staff, registered physiotherapists, registered occupational therapists and students employed during the school vacation period." (26 employees in the unit). (*Having regard to the agreement of the parties*). (*clarity note*).

2234-79-R: Christian Labour Association of Canada (Applicant) v. Frusino Structure Incorporated (Respondent).

Unit: "all carpenters, carpenters' apprentices, construction labourers and reinforcing rodmen in the employ of the respondent in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman." (10 employees in the unit).

2235-79-R: Service Employees Union, Local 204, A.F.L.-C.I.O.-C.L.C. (Applicant) v. Welland County General Hospital (Respondent).

Unit: "all employees of Welland County General Hospital in Welland, Ontario, who are regularly employed for not more than 24 hours per week in a clerical capacity, save and except supervisors, persons above the rank of supervisor and persons covered by subsisting collective agreements." (20 employees in the unit). (*Having regard to the agreement of the parties*).

2241-79-R: Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C. (Applicant) v. Mini Skools Ltd., (Respondent).

Unit: "all employees of Mini-Skools Ltd., in Brampton, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (17 employees in the unit). (*Having regard to the agreement of the parties*).

2249-79-R: The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada – Local Union 628, (Applicant) v. G & H Mechanical Plumbing & Heating & Air Conditioning & Sprinklers, (Respondent).

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in the unit).

2251-79-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, U.A.W., (Applicant) v. K. & A. Tool and Die Limited (Respondent) v. Group of Employees (Objectors).

Unit: "all employees of the respondent employed in the City of Windsor, save and except office staff, sales staff, chief inspector (Quality Control) foremen, those above the rank of foreman and students employed during the school vacation period." (31 employees in the unit).

2272-79-R: Canadian Union of Public Employees (Applicant) v. Marcus Garvey Homes Ltd., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except supervisor/director and persons above the rank of supervisor/director." (7 employees in the unit).

2325-79-R: The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 1133, 1304, 1747, 1963, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Acme Building and Construction Ltd., (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, The Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in the unit).

2335-79-R: Ready Mix Building Supply, Hydro and Construction Drivers, Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America, (Applicant) v. Ambler-Courtney Limited (Respondent).

Unit: "all dependent contractors employed by the respondent as truck drivers in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario." (4 employees in the unit).

Applications Certified Subsequent to Pre-Hearing Vote

1940-79-R: Oil, Chemical & Atomic Workers International Union, (Applicant) v. PCL Packaging Limited (Respondent).

Unit: "all employees of the respondent at Oakville, Ontario, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than 24 hours per week, and students employed during the school vacation period." (172 employees in the unit).

Number of names of persons on revised voters' list		170
Number of persons who cast ballots		157
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	87	
Number of ballots marked against applicant	69	

2066-79-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. St. Vincent Hospital (Respondent) v. International Union of Operating Engineers Local 796 (Intervener).

Unit: "all stationary engineers, firemen, maintenance men and all helpers in the employ of the engineering department of the respondent." (8 employees in the unit).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots		6
Number of ballots marked in favour of applicant	6	
Number of ballots marked against applicant	0	

2137-79-R: International Woodworkers of America (Applicant) v. Mount Forest Caskets Limited (Respondent).

Unit: “all employees of the respondent in Mount Forest, Ontario, save and except persons above the rank of working foreman, working forelady, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (42 employees in the unit).

Number of names of persons on list originally prepared by employer		43
Number of persons who cast ballots	43	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	23	
Number of ballots marked against applicant	19	

Applications Certified Subsequent to Post-Hearing Vote

1851-79-R: Office & Professional Employees International Union (Applicant) v. West Fort William Credit Union Limited (Respondent).

Unit #2: “all employees of the respondent at Thunder Bay regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except custodian, confidential secretary to the manager, manager trainees, supervisor and persons above the rank of supervisor.” (8 employees in the unit). (*Bargaining Unit #1 – See Bargaining Units Certified – No Vote Conducted*).

Number of names of persons on list originally prepared by employer		9
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant	9	
Number of ballots marked against applicant	0	

2062-79-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. K Mart Canada Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent working at its distribution centre in Brampton, Ontario, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (45 employees in the unit).

Number of names of persons on list as originally prepared by employer		43
Number of persons who cast ballots	44	
Ballots segregated and not counted	1	
Number of ballots marked in favour of applicant	23	
Number of ballots marked against applicant	20	

2076-79-R: Service Employees Union, Local 210, affiliated with Service Employees International Union, AFL-CIO-CLC, (Applicant) v. Chatham and District Ambulance Service Ltd., (Respondent).

Unit #1: “all employees of the respondent in Chatham and Wallaceburg, save and except supervi-

sors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (20 employees in the unit). (*full-time unit*).

Number of names of persons on list as originally prepared by employer		20
Number of names of persons on revised voters' list	18	
Number of persons who cast ballots	18	
Number of ballots marked in favour of applicant	18	
Number of ballots marked in favour of London Ambulance Attendants Association – Local #2	0	

Unit #2: "all employees of the respondent in Chatham and Wallaceburg, regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office staff and persons covered by the full-time certificate." (6 employees in the unit). (*part-time unit*).

Number of names of persons on list as originally prepared by employer		6
Number of names of persons on revised voters' list	5	
Number of persons who cast ballots	5	
Number of ballots marked in favour of applicant	5	
Number of ballots marked against applicant	0	

Applications for Certification Dismissed

No Vote Conducted

1949-79-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.) (Applicant) v. Matheson International Trucks Ltd., (Respondent) v. Group of Employees (Objectors). (7 employees).

2163-79-R: United Steelworkers of America (Applicant) v. Maksteel Service Centre, Division of Makagon Industries Ltd., (Respondent) v. Group of Employees (Objectors). (150 employees).

2324-79-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. Dominion Bridge Company Limited (Respondent) v. Ironworkers District Council of Ontario (Intervener).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia Portion, save and except non-working foremen and persons above the rank of non-working foremen." (6 employees in the unit).

0728-79-R: Pharmacists and Professional Employees Association, Local 1976, chartered by the Retail Clerks International Union, C.L.C.-C.I.O.-A.F.L. (Applicant) v. The Regional Municipality of Haldimand-Norfolk (Grandview Lodge) (Respondent).

Unit #1: (*See Bargaining Units Certified – No Vote Conducted.*)

Unit #2: (*See Bargaining Units Certified – No Vote Conducted.*)

Unit #3: (*See Bargaining Units Certified – No Vote Conducted.*)

Unit #4: “all registered nurses regularly employed by the respondent in Dunnville, Ontario for not more than 24 hours per week save and except director of nursing, department heads and persons above the rank of director of nursing or department head.” (5 employees in the unit).

Certification Dismissed Subsequent to Pre-Hearing Vote

1486-79-R: Canadian Union of Public Employees, (Applicant/Complainant) v. Rygiel Home (Respondent).

Voting Constituency: “All employees of the Respondent in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, office and clerical staff and occupational therapist.” (128 employees).

Number of names of persons on revised voters' list		129
Number of persons who cast ballots		120
Ballots segregated and not counted	3	
Number of ballots marked in favour of applicant	60	
Number of ballots marked against applicant	57	

Certification Dismissed Subsequent to Post-Hearing Vote

1734-79-R: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. Cooke Concrete, A Division of T.C.G. Materials Limited (Respondent) v. Group of Employees (Objectors).

Unit: “all employees of the respondent at Burlington, Ontario, save and except foremen, persons above the rank of foreman, dispatchers, dispatcher-shippers, batchers, office, clerical and sales staff, those persons regularly employed during the school vacation period and those persons covered by subsisting collective agreements.” (24 employees in the unit).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots		23
Number of ballots marked in favour of applicant	8	
Number of ballots marked against applicant	15	

2103-79-R: United Steelworkers of America (Applicant) v. Building Products of Canada Limited (Respondent) v. Ready Mix Building Supply, Hydro and Construction Drivers, Local 230, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Intervener) v. Group of Employees (Objectors).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, technical staff, students employed during the school vacation period, persons regularly employed for not more than 24 hours per week and persons covered by a subsisting collective agreement between the respondent and the intervener made on October 1, 1979.” (25 employees in the unit).

Number of names of persons on revised voters' list		24
Number of persons who cast ballots		24
Number of ballots marked in favour of applicant	2	
Number of ballots marked against applicant	22	

APPLICATION FOR CERTIFICATION WITHDRAWN

1767-79-R: Pharmacists and Professional Employees Association Local 1976 chartered by the Retail Clerks International Union, C.L.C.-C.I.O.-A.F.L., (Applicant) v. Picton Manor Nursing Home (Respondent) v. Employee (Objector).

Unit #1: (*See Bargaining Units Certified – No Vote Conducted*).

Unit #2: "all employees regularly employed for not more than 24 hours per week."

0049-79-R: The Association of Newspaper Agents (Applicant) v. The Globe and Mail Division of F.P. Publications (Eastern) Limited (Respondent). (62 employees).

2112-79-R: Canadian Union of Restaurant and Related Employees (Applicant) v. Foodcorp Limited, carrying on business as Swiss Chalet Bar B.Q., (Respondent). (57 employees).

2144-79-R: Service Employees' Union, Local 478, A.F. of L., C.I.O., C.L.C. (Applicant) v. V. Scott Management Corporation (Respondent). (4 employees).

2184-79-R: Labourers' International Union of North America, Local 183 (Applicant) v. Loc Wall Limited (Respondent). (4 employees).

2206-79-R: Canadian Union of Public Employees (Applicant) v. The Regional Municipality of Niagara (Respondent) v. Ontario Nurses' Association (Intervener).

2229-79-R: Hotel and Club Employees' Union, Local 299, Toronto, of the Hotel and Restaurant Employees' and Bartenders' International Union (A.F.L.-C.I.O.-C.L.C.) (Applicant) v. Skyline Hotel (Respondent) v. International Beverage Dispensers' and Bartenders' Union, Local 280 (Intervener). (634 employees).

2237-79-R: Labourers' International Union of North America, Local 506, (Applicant) v. International Exposition Services Inc., (Respondent). (7 employees).

2292-79-R: International Union of Operating Engineers, Local 772, (Applicant) v. Selinger Wood Ltd., (Respondent). (5 employees).

2337-79-R: Restaurant, Cafeteria and Tavern Employees Union Local 254, of the Hotel and Restaurant Employees and Bartenders International Union (Applicant) v. The Ontario Jockey Club (Respondent). (15 employees).

2351-70-R: Ontario Public Service Employees Union (Applicant) v. Tri-Town Association for the Mentally Retarded (Respondent). (19 employees).

2358-79-R: United Steelworkers of America (Applicant) v. Eastern Ontario Stove Works Inc., (Respondent). (37 employees).

2375-79-R: Local Union 1669, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Canadian Pittsburgh Industries (Respondent). (14 employees).

2376-79-R: Labourers' International Union of North America, Local Union 183 (Applicant) v. Gordale Contracting Company (Respondent). (2 employees).

APPLICATIONS UNDER SECTION 1(4)

0491-79-R: International Union of Operating Engineers, Local 793, (Applicant) v. The Tatham Company Limited, Magnus Construction Limited and The Tatham Company Limited (Respondents) v. Magnus Engineering And Construction Limited (Intervener) v. Group of Employees (Objectors).

1744-79-R: The Toronto Building and Construction Trades Council and Labourers' International Union of North America, Local 506 (Applicant) v. Rili Construction (Weston) Limited and General Contractors Section, Toronto Construction Association (Respondents) v. Labourers' International Union of North America, Local 183 and The Form Work Council of Ontario (Intervener #1) v. Rili-brother Forming Limited (Intervener #2).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1875-79-R: James Rook, Wilk Clement, Clayt Monk, Sharon Price, Brenda Hammer and Eric Scott (Applicants) v. Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (AFL-CIO-CLC), (Respondent) v. The Brantford Expositor, a Division of Southam Inc., (Intervener). (*Granted*).

Unit: "all employees in the Circulation Department, except Circulation Manager, Sales Manager, Circulation; persons above the rank of Circulation Manager and Sales Manager, Circulation, persons regularly employed for not more than 24 hours per week; students employed during the school vacation period; temporary employees employed for special projects and Confidential Secretary to the Circulation Manager." (11 employees in the unit).

Number of names of persons on revised voters' list		11
Number of persons who cast ballots		11
Number of ballots marked in favour of the respondent	5	
Number of ballots marked against the respondent	6	

2089-79-R: Gerry Decker (Applicant) v. Bakery, Confectionery and Tobacco Workers' International Union, Local Union 264 (Respondent). (718 employees). (*Dismissed*).

2158-79-R: Donna Badgley (Applicant) v. Amalgamated Clothing and Textile Workers Union (Respondent) v. Lear Siegler Industries Ltd/Delany & Petit Operations (Intervener). (110 employees). (*Dismissed*).

2222-79-R: Homida Ali (Applicant) v. United Auto Workers Local 2078 (Respondent) v. Ontario Hospital Association (Blue Cross) (Intervener). (422 employees). (*Dismissed*).

APPLICATIONS FOR DECLARATIONS THAT STRIKE UNLAWFUL

2145-79-U: Corporation of the City of St. Catharines (Applicant) v. Gerardus Fatels and John Flynn on their own behalf and on behalf of Local 157 of the Canadian Union of Public Employees, and Robert Eckhardt, Lawrence Carpenter, Rick Norton, Gary Wade, Douglas Groombridge and Keith Givens on their own behalf and on behalf of Local 150 of the Canadian Union of Public Employees, and Joe Bouchard on his own behalf and on behalf of Local 150 and Local 157 of the Canadian Union of Public Employees, and certain other persons, (Respondents). (*Terminated*).

2217-79-U: United Cement, Lime & Gypsum Workers International Union (Applicant) v. Ben-David Excavating and Contracting Ltd., (Respondent). (*Withdrawn*).

2259-79-U: Canadian Totalisator Company (Applicant) v. Victor Battey, Andre Blouin, Scot Bull, Frank Dambrosi, Jerry DeBartolo, Douglas Eaton, John A. Eisman, William Evans, Bruce Flemming, Roger M. Foster, Richard Gottron, Donald Kovacs, Derek Kwok, Michel LaBarre, Bill Leung, Ferris Marcelin, Pat Molloy, David Pang, Frank Radli, George Robertson, Wm. Sydor, Cameron Wilson, Michael Wiseman, Reijo Vataja, Tak Yamamoto (Respondents). (*Granted*).

2261-79-U: Canadian Totalisator Company (Applicant) v. International Brotherhood of Electrical Workers, Local 1501, AFL-CIL-CLC., (Respondent). (*Granted*).

2277-79-U: Bramalea Limited and Acme Building and Construction Limited (Applicants) v. Toronto Building & Construction Trades Council; Mike Lloyd; International Brotherhood of Electrical Workers, Local 353; R. Carroll; The International Union of Bricklayers and Allied Craftsmen, Local 2; Roy Stroud; Ron Van Slyke, (Respondents). (*Withdrawn*).

APPLICATIONS FOR DECLARATION THAT LOCK-OUT UNLAWFUL

2197-79-U: Service Employees Union, Local 204, AFL-CIO-CLC, (Applicant) v. Doral Construction Limited and Michael Allen (Respondents). (*Dismissed*).

2207-79-U: United Cement, Lime & Gypsum Workers International Union (Applicant) v. S & F Excavating Co. Ltd., (Respondent). (*Granted*).

APPLICATIONS FOR CONSENT TO PROSECUTE

2147-79-U: Corporation of the City of St. Catharines (Applicant) v. Gerardus Fatels and John Flynn on their own behalf and on behalf of Local 157 of the Canadian Union of Public Employees, and Robert Eckhardt, Lawrence Carpenter, Rick Norton, Gary Wade, Douglas Groombridge and Keith Givens on their own behalf and on behalf of Local 150 of the Canadian Union of Public Employees, and Joe Bouchard on his own behalf and on behalf of Local 150 and Local 157 of the Canadian Union of Public Employees, and certain other persons (Respondents). (*Terminated*).

2226-79-U: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and The International Union of Bricklayers and Allied Craftsmen Local 7 (Applicant) v. Joe Arban Contractor Limited (Respondent). (*Withdrawn*).

COMPLAINTS UNDER SECTION 79 (UNFAIR LABOUR PRACTICE)

0562-79-U: Ontario Taxi Association, Local 1688, C.L.C., (Complainant) v. Glen Taxi 1978 Limited (Respondent). (*Granted*).

0837-79-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Russell MacVicar Limited (Respondent).

- and -

1798-79-U: Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Russell MacVicar Limited (Respondent). (*Granted*).

0859-79-U: The Niagara Falls Co-operative Taxi Owners Association and William Manson (Complainant) v. William Peters, carrying on business as Niagara Veteran Taxi (Respondent). (*Dismissed*).

1012-79-U: James Lucas (Complainant) v. International Union of Operating Engineers, Local 793 and The Corporation of the County of Hastings (Respondents). (*Terminated*).

1394-79-U: James H. Hopson (Complainant) v. International Union of Operating Engineers, Local 796 & York University (Respondents). (*Dismissed*).

1446-79-U: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. G.T. Couriers (416656 Ontario Ltd.) (Respondent). (*Withdrawn*).

1554-79-U: Maria De Bellis, Antonietta Colucci, Alma Padoan (Complainants) v. Ganz Brothers Toys Limited (Respondent) v. International Union of Allied Novelty and Production Workers, Local 905 (Intervener). (*Terminated*).

1614-79-U: Canadian Paperworkers Union and its Local 1199 (Complainant) v. Independent Paper Convertors Inc., (Respondent). (*Withdrawn*).

1701-79-U: Peter George (Complainant) v. United Steelworkers of America, Local 2859 and Babcock Wilcox Canada Ltd., (Respondents). (*Withdrawn*).

1796-79-U: Canadian Union of Public Employees (Applicant/Complainant) v. Rygiel Home (Respondent). (*Dismissed*).

1846-79-U: Hotels, Clubs, Restaurants & Tavern Employees' Union Local 261 (Complainant) v. Boretos & Tsotsos, carrying on business as Nicholson's Restaurants, Steak House & Tavern (Respondent). (*Dismissed*).

1932-79-U: Cherry Rowe (Complainant) v. American Federation of Grain Millers International AFL-CIO-CLC Local 230 (Respondent) v. General Mills Canada, Ltd., (Intervener). (*Dismissed*).

1943-79-U: Canadian Union of Public Employees (Complainant) v. Kenora and District Family and Children's Services (Respondent). (*Withdrawn*).

1944-79-U: Canadian Union of Public Employees (Complainant) v. Kenora and District Family and Children's Services (Respondent). (*Withdrawn*).

1966-79-U: United Steelworkers of America (Complainant) v. York Disposal Services (Respondent). (*Withdrawn*).

2018-79-U: International Ladies' Garment Workers' Union (Complainant) v. New-Port Sportswear Ltd., (Respondent) (*Withdrawn*).

2028-79-U: United Brotherhood of Carpenters & Joiners of America, Local 3054 (Complainant) v. Selinger Wood Limited, Peter Selinger, Walter Milley, and Keith Huizer (Respondents). (*Granted*).

2029-79-U: Hotel and Club Employees' Union, Local 299 Toronto of the Hotel and Restaurant Employees' and Bartenders' International Union, (AFL-CIO-CLC), (Complainant) v. Sutton Place Hotel and Dennis Commercial Properties (Respondents). (*Granted*).

2032-79-U: Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local Union 304, (Complainant) v. Fortier Beverages Ltd. and Mr. R. Fortier (Respondent). (*Withdrawn*).

2040-79-U: Hotel, Restaurant Employees and Bartenders Union, Local 604 AFL-CIO-CLC, (Complainant) v. The Grand Hotel (Respondent). (*Withdrawn*).

2046-79-U: The Hotel and Club Employees' Union Local 299, Toronto, Ontario of the Hotel and Restaurant Employees' and Bartenders' International Union (AFL-CIO-CLC) (Complainant) v. Hotel Canadiana (Respondent). (*Withdrawn*).

2056-79-U: Hotels, Clubs, Restaurants & Tavern Employees' Union Local 261 (Complainant) v. Carmen Fisher and Fuller's Restaurant (Respondents). (*Withdrawn*).

2057-79-U: Hotel, Clubs, Restaurants & Tavern Employees' Union Local 261 (Complainant) v. Fullers' Restaurant (Respondent). (*Withdrawn*).

2058-79-U: Canadian Union of Public Employees (Complainant) v. Lenadco Home for the Aged (Respondent). (*Withdrawn*).

2067-79-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Complainant) v. Matheson International Trucks Ltd., (Respondent). (*Withdrawn*).

2068-79-U: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (U.A.W.) (Complainant) v. Matheson International Trucks Ltd., (Respondent). (*Withdrawn*).

2070-79-U: International Molders & Allied Workers Union (Complainant) v. Canadian Recycling Laboratories Limited (Respondent). (*Withdrawn*).

2075-79-U: Violante Iafrate (Complainant) v. Canadian Food & Allied Workers (Local Union 1129) (Respondent) v. Bick's Pickles (Intervener). (*Withdrawn*).

2077-79-U: International Molders & Allied Workers Union (Complainant) v. Canadian Recycling Laboratories Limited (Respondent). (*Withdrawn*).

2100-79-U: Franklin Hudson Breakenridge (Complainant) v. United Cement, Lime and Gypsum Workers International Union, Local 387 thereof, District Council 10 thereof and the International thereof, and Lake Ontario Cement Ltd., (Respondents). (*Withdrawn*).

2102-79-R: United Cement, Lime & Gypsum Workers International Union (Complainant) v. S & F Excavating Ltd., (Respondent). (*Withdrawn*).

2123-79-U: Ontario Public Service Employees Union (Complainant) v. Town of Midland and Mr. G. Wallace (Respondents). (*Withdrawn*).

2146-79-U: Corporation of the City of St. Catharines (Applicant) v. Gerardus Fatels and John Flynn on their own behalf and on behalf of Local 157 of the Canadian Union of Public Employees, and Robert Eckhardt, Lawrence Carpenter, Rick Norton, Gary Wade, Douglas Groombridge and Keith Givens on their own behalf and on behalf of Local 150 of the Canadian Union of Public Employees, and Joe Bouchard on his own behalf and on behalf of Local 150 and Local 157 of the Canadian Union of Public Employees, and certain other persons (Respondents) (*Terminated*).

2153-79-U: Sandra Dawson (Complainant) v. Canadian Linen Supply (Respondent). (*Dismissed*).

2162-79-U: Fuel, Bus, Limousine, Petroleum Drivers and Allied Employees Local Union No. 352, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Toronto International Airport Limousine Operators Association (Respondent). (*Withdrawn*).

2165-79-U: George Gordon Smith (Applicant) v. Drug Trading Company Limited (Respondent). (*Withdrawn*).

2201-79-U: United Steelworkers of America (Complainant) v. Makstell Service Centre (Respondent). (*Withdrawn*).

2257-79-U: Teamsters Union Local 938 affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Complainant) v. Z.P. Cartage & Transportation Consultants Limited (Respondent). (*Withdrawn*).

2267-79-U: George E. Bartley (Complainant) v. International Brotherhood of Painters and Allied Trades Local 1919 (Respondent). (*Withdrawn*).

2268-79-U: George E. Bartley (Complainant) v. C.H. Heist Limited (Respondent). (*Withdrawn*).

2269-79-U: Thornley Kennedy (Complainant) v. Upholsterers' International Union of North America (Respondent). (*Withdrawn*).

2279-79-U: United Steelworkers of America (Complainant) v. North America Fabricators Ltd., (Respondent). (*Withdrawn*).

2289-79-U: Ontario Nurses' Association (Complainant) v. West Park Hospital (Respondent). (*Withdrawn*).

2291-79-U: Orval W. Wood (Complainant) v. General Motors UAW Local 222 (Respondent). (*Withdrawn*).

2369-79-U: Sandy Maclellan (Complainant) v. Weldwood of Canada (Respondent). (*Withdrawn*).

2407-79-U: The International Association of Machinists and Aerospace Workers (Complainant) v. Cochrane Tool and Design Ltd. (Seimon Co. of Canada Ltd.) (Respondent). (*Withdrawn*).

APPLICATIONS UNDER THE OCCUPATIONAL HEALTH & SAFETY ACT

2125-79-OH: Sandra Melvin (Complainant) v. The Perley Hospital (Respondent). (*Withdrawn*).

2185-79-OH: Casey Dodds (Complainant) v. Storall Industries Limited (Respondent). (*Withdrawn*).

APPLICATIONS UNDER SECTION 55

0486-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency, Magnus Construction Limited and The Tatham Company Limited (Respondents) v. Magnus Engineering and Construction Limited (Intervener). (*Granted*).

1718-79-R: Union of Canadian Retail Employees, Local 1000A Chartered by the United Food and Commercial Workers International Union (Applicant) v. Freier's Delicatessen (Respondent). (*Withdrawn*).

1900-79-R: The International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Thorold Hydro-Electric Commission (Respondent). (*Granted*).

1901-79-R: The International Brotherhood of Electrical Workers, Local 636 (Applicant) v. Port Colborne Hydro-Electric Commission (Respondent). (*Granted*).

2045-79-U: Hotel and Restaurant Employees and Bartenders Union, Local 604 (Applicant) v. Grand Hotel, 295 George Street, Peterborough, Ontario (Respondent). (*Withdrawn*).

2080-79-R: International Beverage Dispensers' and Bartenders' Union, Local 280 (Applicant) v. M.H. Roebuck, Q.C. and Bancorp Capitol Limited (Respondents). (*Granted*).

2138-79-R: Local 636 of the International Brotherhood of Electrical Workers (Applicant) v. Burlington Hydro-Electric Commission (Respondent). (*Dismissed*).

2225-79-R: International Union of Operating Engineers, Local 793 (Applicant) v. Erie Sand and Gravel Limited and Sterling Acre Farms Limited (Respondents). (*Terminated*).

APPLICATIONS FOR DETERMINATION UNDER SECTION 95(2)

0891-79-M: Service Employees Union, Local 268 (Trade Union) v. Lakehead University (Employer). (*Withdrawn*).

1131-79-M: Office and Professional Employees International Union, Local 343 (Applicant) v. Ontario Secondary School Teachers' Federation (Respondent). (*Granted*).

1262-79-M: The Cottage Hospital (Uxbridge), (Applicant) v. Ontario Nurses' Association (Respondent). (*Granted*).

1993-79-M: Local 1738, U.A.W. (Applicant) v. R.J. Simpson Manufacturing Company (Canada) Limited (Respondent). (*Withdrawn*).

2049-79-M: Central Park Lodges of Canada (Applicant) v. Service Employees Union, Local 210 (Respondent). (*Dismissed*).

REFERENCE TO BOARD PURSUANT TO SECTION 96

1852-79-M: Ontario Film Laboratories Ltd., (Sudbury Division) (Formerly Sudbury Photo Service Limited) (Employer) v. Retail, Wholesale and Department Store Union, Local 579, of the Retail, Wholesale and Department Store Union, AFL-CIO-CLC, (Trade Union). (*Granted*).

APPLICATIONS UNDER SECTION 112a

0275-79-M: The Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. Dominion Maintenance Ltd., Harkness Waters Ltd., K.L. McCormick Painting Co. and Gallant Enterprises (Respondents). (*Withdrawn*).

0325-79-M: The Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. C.H.Heist Limited (Respondent). (*Withdrawn*).

0605-79-M: International Association of Bridge, Structural and Ornamental Ironworkers, Locals 700, 721 & 736, (Applicant) v. Brant Erecting & Hoisting (Respondent). (*Granted*).

1292-79-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wes Emery Display Ltd., (Respondent). (*Granted*). (*see 2219-79-M*).

1743-79-M: The Toronto Building and Construction Trades Council and Labourers' International Union of North America, Local 506 (Applicants) v. West York Construction Limited and General Contractors Section, Toronto Construction Association (Respondents) v. A Council of Trade Unions, acting as Representative and Agent of the International Union of Operating Engineers, Local 793 and Labourers' International Union of North America, Local 183; and, Labourers' International Union of North America, Local 183 (Intervenors). (*Withdrawn*).

1745-79-M: The Toronto Building and Construction Trades Council and Labourers' International Union of North America, Local 506 (Applicants) v. J.D.S. Investments Limited and General Contractors Section, Toronto Construction Association (Respondents). (*Granted*).

1746-79-M: The Toronto Building and Construction Trades Council and Labourers' International Union of North America, Local 506 (Applicant) v. Bau Canada Ltd., General Contractors Section, Toronto Construction Association and West York Construction Limited (Respondents). (*Withdrawn*).

1896-79-M: International Union of Operating Engineers, Local 793 (Applicant) v. Employer Bargaining Agency and Nadrofsky Steel Erecting Ltd., (Respondent). (*Terminated*).

1997-79-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Niagara Peninsula Insulation Limited (Respondent). (*Withdrawn*).

2047-79-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Modular Interior, (Respondent)

- and -

2132-79-M: The United Brotherhood of Carpenters and Joiners of America, Local 675 (Applicant) v. Carpenters' Employer Bargaining Agency, consisting of: The Labour Relations Bureau of the Ontario General Contractors Association, Accoustical Association of Ontario, Resilient Flooring Contractors Association of Ontario, Caulking Contractors Association of Ontario, and Industrial Contractors Association of Canada, and Modular Interiors Limited (Respondent). (*Granted*).

2093-79-M: Labourers' International Union of North America Local 1089 (Applicant) v. Deuces Masonry Limited (Respondent). (*Granted*).

2115-79-M: Labourers' International Union of North America, Local 183 (Applicant) v. The Ontario Form Work Association & Kirgui Investments Ltd., (Respondents). (*Withdrawn*).

2167-79-M: A Council of Trade Unions, acting as the representative and agent of Teamsters Local Union 230 and Labourers' International Union of North America, Local Union 183 (Applicant) v. The Metropolitan Toronto Sewer and Watermain Contractors' Association & Fusion Equipment Canada Ltd., (Respondent). (*Withdrawn*).

2183-79-M: Council of Trade Unions Teamsters Local Union No. 230, and Labourers International of North America Local Union 183 (Applicant) v. Mizzi Brothers (Respondent). (*Withdrawn*).

2219-79-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1304, 1963, 2480, 2482, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wes Emery Display Ltd., (Respondent). (*Granted*). (*see 1292-79-M*).

2227-79-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Joe Arban Contractor Limited (Respondent). (*Withdrawn*).

2233-79-M: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Stephens-Adamson, Division of Allis-Chalmers (Canada) Limited; Association of Millwrighting Contractors of Ontario Inc., (Respondent). (*Granted*).

2242-79-M: The Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Mykael Construction Limited (Respondent). (*Granted*).

2265-79-M: United Brotherhood of Carpenters and Joiners of America Local Union 93 (Applicant) v. J. Corda Construction Ltd. (Respondent). (*Withdrawn*).

2347-79-M: The Teamsters Local Union Number 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Applicant) v. S & F Excavating Co. Ltd., (Respondent). (*Withdrawn*).

2381-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. T. Richardson Mechanical & Millwrighting Inc. (Respondent). (*Withdrawn*).

2382-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Baragar Mechanical Installations Ltd. (Respondent). (*Withdrawn*).

2386-79-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Imicon Construction Ltd., (Respondent). (*Withdrawn*).

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